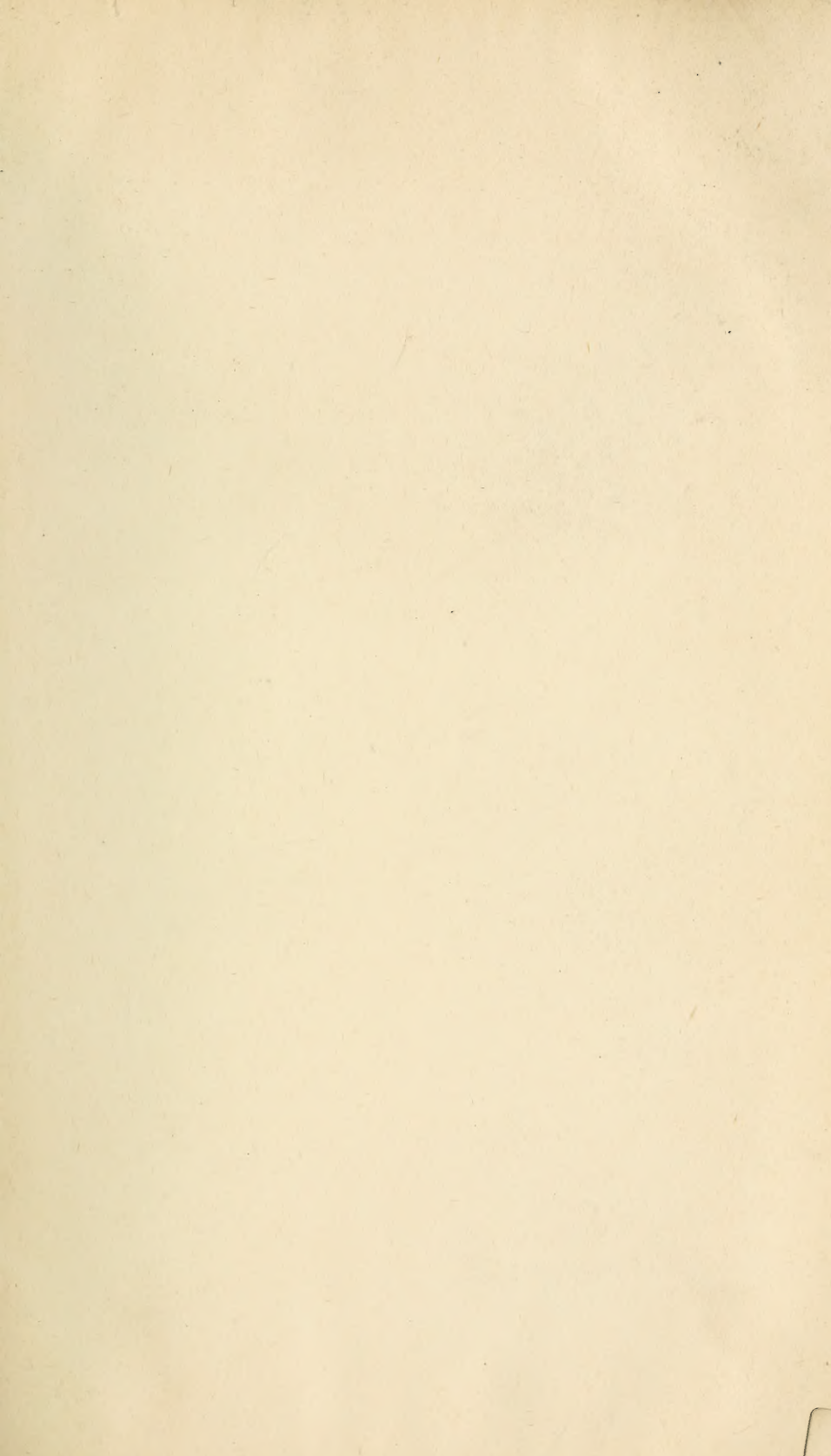


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PUTERBAUGH'S

COMMON LAW

PLEADING AND PRACTICE.

A PRACTICAL TREATISE

ON THE

FORMS OF COMMON LAW ACTIONS, PLEADING AND PRACTICE,
NOW IN USE IN THE STATE OF ILLINOIS, AND
WHEREVER THE SAME SYSTEM
PREVAILS.

By SABIN D. PUTERBAUGH,

LATE JUDGE OF THE CIRCUIT COURT, AND AUTHOR OF
PUTERBAUGH'S CHANCERY PLEADING
AND PRACTICE.

REVISED BY LESLIE D. PUTERBAUGH,

JUDGE OF THE PROBATE COURT OF
PEORIA CO., ILL.

SEVENTH EDITION.

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INTRODUCTION TO THE SIXTH EDITION.

In presenting this, the sixth edition of this work, the author deems an extended introduction unnecessary. The first edition was published in 1864, then in a crude condition, with meager hopes of its success. Since then it has passed through four revisions, with a constant and earnest endeavor, on the part of the author, to make it as perfect and reliable as his abilities, amidst professional and judicial duties, would permit. Whatever merits or demerits former editions possessed are well understood by the courts and members of the profession throughout the State of Illinois, and other States and Territories where the work has been used and recognized.

Since the last revision there have been constant, and in many instances material and radical changes in the Statutes upon subjects herein considered. The decisions of the Supreme and Appellate Courts have shed much light upon questions of pleading and practice, and given constructions of statutory remedies and defenses which have rendered former editions, in many respects, an unsafe guide.

General principles of law and justice are immutable, but the remedies for enforcing rights are subject to constant changes. As new exigencies arise, courts are called upon to give constructions to the same, as governed by such general legal principles.

It is to be hoped that the present edition will be found to contain correct pleadings and practice at common law, and statutory remedies and defenses, so far as it pretends to treat, as it exists in Illinois to-day.

* * * * *

It has been the constant aim of the author to compress into a single volume the greatest amount of information possible. In following this general plan much valuable matter is necessarily crowded out, and great brevity required in the subjects considered. To partially obviate this omission references have been freely made to other works of standard authority, where the several subjects have been separately and elaborately treated.

The author is grateful for the generous favor and kind reception with which former editions of this work have been received by the courts and members of the bar, and trusts the present edition will deserve and receive the same favorable reception and consideration.

S. D. PUTERBAUGH.

PEORIA, ILL., March 1, 1888.

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INTRODUCTION TO THE SEVENTH EDITION.

In the preparation of the present edition, the entire work has been thoroughly revised and re-arranged.

Although the volume contains much new matter, by the use of smaller type for forms, its size has not been materially increased.

Several new chapters and a number of new forms have been added.

Many additional cases are cited, including the decisions of the Supreme Court reported in from the 121st to the 161st volume of the Illinois Reports, and of the Appellate Courts from the 21st to the 62d volumes of the reports of its opinions. References are made to the latest Statutes.

The full titles to the cases cited are given instead of the book and page numbers only as in former editions.

The work has been more fully indexed than formerly, and by the use of the side headings it is believed that the various subjects treated may be more readily found.

LESLIE D. PUTERBAUGH.

PEORIA, ILL., October 1, 1896.

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PUTERBAUGH'S

COMMON LAW

PLEADING AND PRACTICE.

CHAPTER I.

GENERAL PRINCIPLES OF PLEADINGS.

Object of—Term defined.—The important object to be attained in pleading is to bring the subject-matter of contention in an action to an issue—to a point where a matter is affirmed on one side and denied on the other—to render the facts in each party's case plain and intelligible, and to refer the points at issue to the court and jury, with all possible simplicity, for their decision.

Outside of the profession, the term *pleading* is most generally understood to be the forensic argument in a case; it is, however, the statement, in a plain, logical and legal form, of those facts which, in law, show the justice of the demand made by the plaintiff, or the discharge and defense of the defendant. It is the formal mode of alleging that on the record which is the basis of the action, or the ground of defense.

The common law system.—The common law system, which is retained and practiced in many states and territories of the Union, is one of great antiquity.

Anciently, all pleadings were delivered orally, and in open court, and were contemporaneously entered on the record. This mode was in use in the reign of Henry III. In later times the pleader entered his statement in the first instance

upon the parchment roll on which the record was formerly drawn up; the opposite party, having access to this roll, entered his answer in the same manner, and so on, until an issue was presented; and the roll thus formed the record of the cause. This method being attended with many inconveniences, the expedient was at length adopted of putting the pleadings first on paper, and filing them in the proper office of the court. Written pleadings are supposed by many writers to have been introduced in the reign of Edward III. The abandonment of the practice of oral pleading led to no departure from the ancient style of allegation. The pleadings have ever since continued to be framed upon the same principles, and pursue the same forms, as when they were merely oral. The parties are made to come to issue exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all rules which the judges of former times prescribed to the actual disputants before them are, as far as possible, still enforced with respect to these paper pleadings.

Pleading is said to have been first methodically formed, and cultivated into a science, in the reign of Edward I. From that time, the judges began to prescribe and enforce certain rules of statement, of which some had been established at periods considerably more remote, and others apparently were then, from time to time, first introduced. The science continued to advance till the reign of Henry VI. and Edward IV., when it was "cultivated with so much industry and skill, that it was raised to a sudden perfection in the course of a few years." But Lord Coke and Sir Matthew Hale refer to the reign of Edward III. as the period when pleading had attained its highest point of excellence.

In Illinois.—The common law system of pleading prevails in Illinois. It has from time to time, been so modified by statute, as to remove arbitrary and artificial distinctions, and by the allowance of amendments at any and every stage of the proceedings and to every reasonable extent, its purely technical and objectionable features have been largely done away with. With the general logical arrangement of the system, as at common law, there has been no interference by

statute. The order of pleading, and the structure and office of pleas of different character, remain substantially unchanged.

Kinds of actions.—Actions are either *real*, *personal* or *mixed*. Real actions are those where a party claims title to have any lands, tenements, rents, commons or other hereditaments, in fee simple, fee tail or for term of life; by which actions formerly, all disputes concerning real estate were determined.

Personal actions are those where a man claims a debt or personal property or damages in lieu thereof; where he seeks a recovery of a specific personal chattel or a satisfaction in damages for a breach of a contract, or for some injury to person or property. Personal actions are divided into actions *ex contractu* and actions *ex delicto*. Actions *ex contractu* are principally *assumpsit*, *debt*, *covenant*, *account* and *detinue*, and those *ex delicto* are *case*, *trover*, *replevin* and *trespass*.

Mixed actions are those partaking of the nature of real and personal actions and are generally brought for the recovery of real property, and also, for damages for detention or injury thereof, as for instance the action of ejectment, or waste, or *quare impedit*. Under these three heads may every species of remedy by suit in the courts of common law be comprised.

Forms of actions.—The forms of actions commonly resorted to for the redress of civil injuries are Assumpsit, Account, Debt, Covenant, Detinue, Case, Replevin, Trespass, Trover and Ejectment. These remedies are drawn from the common law of England, as being the best known methods of appealing to the public authority for the redress of private wrongs. By statutory enactment, many of the states have adopted the common law of England, and all statutes of the British Parliament of a general nature in aid thereof, prior to the fourth year of King James I. Many of these forms of action have been modified by subsequent legislation, and some peculiar statutory remedies have been introduced; but in general the great leading features of the common law, in relation to the mode of obtaining redress of private injuries by action at law, still prevail in most of the United States. In Illinois the distinction

between the actions of trespass and trespass on the case has been abolished by a recent statute.¹

Order of pleadings.—The pleadings in a cause are commenced, on the part of the plaintiff, with the *declaration*, which is a statement in writing of his cause of action in legal form. This declaration, as every other pleading in the cause, is required to be framed agreeably to the established rules and forms of pleading, and if defective in any particular, either in substance or form, may be objected to as insufficient in law, by *demurrer*, on the part of the defendant; or he may allege some matter in abatement of the action, or may deny the declaration to be true in point of fact, or may set up matter in avoidance of it—such answer on the part of the defendant being technically denominated his *plea*. To the defense thus made, the plaintiff may again, in his turn, *reply*, either in case of demurrer, by re-asserting his declaration to be sufficient in law to support his action, and referring that question to the judgment of the court, which is termed a *joinder in demurrer*; or, in case of a special plea, he may on his part demur to such plea, as insufficient in law to constitute a defense; or he may deny it to be true in point of fact or allege some new matter in avoidance of it, according to the circumstances—such answer being styled a *replication*. To the replication the defendant may either demur upon the law, or oppose a *rejoinder* as to the fact; and to the rejoinder the plaintiff may demur, or oppose a *surrejoinder*; and so the parties may proceed, by a system of alternate *allegation* and *objection*, *denial* or *evasion*, technically termed the pleadings, until they arrive at an issue, that is, some specific point of law or fact, affirmed on one side and denied on the other, and presenting the exact question for the court or jury to determine. The manner of forming these issues, and the precedents to be used in each step of the pleadings in each form of action, will be considered and pointed out in the subsequent chapters.

¹ 2 Starr & Curtis, 1787; Rev. Stat. (1893), 1074; Rev. Stat. (1895), 1158; *Barker v. Koozier*, 80 Ill. 205; *Krug v. Ward*, 77 Ill. 603; *Blalock v. Randall*, 76 Ill. 224.

CHAPTER II.

COMMENCEMENT OF AN ACTION.

THE PRAECIPE.

BAIL IN CIVIL CASES.

AFFIDAVIT OF PLAINTIFF'S CLAIM.

SECURITY FOR COSTS.

PARTIES TO AN ACTION.

PROCESS FOR APPEARANCE.

DECLARATION.

COPY OF ACCOUNT.

The praecipe.—In general, the issuing of the writ is the commencement of the suit¹; but it is usual for the attorney of the plaintiff to file with the clerk of the court a *praecipe*, or order directing such process to be issued against the defendant, as the nature of the case may require. The *praecipe* should specify the *court*, the *names* of the *parties*, the *kind of action*, the *kind of writ*, and when it is to be made returnable; and the amount of the debt and damages, in case of debt, and of damages in other actions.

The damages claimed in the *praecipe* should be large enough to cover the amount due; for if the judgment obtained is greater than the damages claimed, it will be error;² but to be taken advantage of upon appeal the objection must be made in trial court.³ Where, however, the verdict or finding is for more than the amount claimed, the excess may be remitted before or at the time of entering judgment. But where the *ad damnum*, by mistake, is made too small, as appears by computation of the sum laid in the declaration, the same may be amended, even after verdict.

¹ *Feazle v. Simpson*, 1 Scam. 30;
Ins. Co. v. Schroeder, 9 Bradw. 472;
Utter v. Jaffray, 15 Bradw. 236.

² *Linden v. Monroe*, 33 Ill. 388;
Altes v. Hinckler, 36 Ill. 275; *Pier-*
son v. Finney, 37 Ill. 29.

³ *Utter v. Jaffray*, 114 Ill. 470; *A.*
O. U. W. v. Jesse, 50 Ill. App. 101;
Cunningham v. Alexander, 58 Ill.
App. 296; *Accident Ass'n v. Froiland*,
59 Ill. App. 522.

Where suit is brought by or against administrators, executors, guardians, and the like, they should be so described in the *praecipe* and care should be taken to give proper description to the parties to the suit, and other particulars, as a variance between the writ and declaration as to the parties, cause of action, or amount of damages alleged, will be ground for a plea in abatement, or, in some cases, for motion to quash.¹

But where a suit is instituted in the individual names of school directors, in reference to a matter in which they are only interested in their corporate capacity, the court will allow the title of the cause to be amended by striking out the individual names of the directors, and substituting their corporate name.² Corporations should be described in all legal proceedings by their corporate names.³

If a promise is made to or by a corporation or person by a wrong name, the action should be brought in the right name, setting forth the facts in the declaration; but otherwise where a specialty is entered into by a wrong name.⁴ The cautious pleader will generally file a *praecipe*, as a guide to the clerk in preparing the summons; and then if the writ should happen to be erroneous, the fault may be amended by the *praecipe*;⁵ although it is not essential to the proper and legal issuing of the summons that a *praecipe* should be filed at all.

PRAECIPE for Summons or CAPIAS.

In the — Court of the County of —, in the State of Illinois.

A. B. }
 vs. } —. Damages \$—.
 C. D. }

The clerk of the said court will issue a summons (or “*capias ad respondendum*”), as above, directed to the sheriff of the county of —, and returnable to the — term, 18—.

(Date.)

E. F., Attorney for Plaintiff.

To J. K., Clerk, etc.

¹ *Rust v. Frothingham*, Breese 331; *Prince v. Lamb*, Breese 378; *Cruickshank v. Brown*, 5 Gilm. 75; *Weld v. Hubbard*, 11 Ill. 574; *Rowley v. Berrian*, 12 Ill. 199; *Carpenter v. Hoyt*, 17 Ill. 530; *Plato v. Terrill*, 18 Ill. 274; *Schoonhoven v. Gott*, 20 Ill. 46; *Reaugh v. McConnell*, 36 Ill. 373; *Windett v. Hamilton*, 52 Ill. 180.

² *Shoudy v. Directors*, 32 Ill. 290.

³ *Ill. Hosp. v. Higgins*, 15 Ill. 185.

⁴ 1 Chitty's Pl. 223; Gould's Pl. 241.

⁵ *Thompson v. Turner*, 22 Ill. 389.

Bail in civil cases—*Capias ad respondendum*.—The first section of the Illinois statute concerning bail in civil cases, in force from and after July 1, 1872, provides, that when any person shall be about to commence a suit in any court of record in the state, founded upon any specialty, bill or note in writing, or on the judgment of any court, and in all actions of covenant and account, and actions on verbal contracts or assumpsits at law, if the plaintiff, or his agent or attorney, shall make an affidavit setting forth the cause of action, and the amount due the plaintiff, and facts showing that the defendant fraudulently contracted the debt, or incurred the obligation, respecting which the suit is about to be brought, or that he has concealed, assigned, removed, or disposed of his property with intent to defraud such plaintiff, and shall present such affidavit to a judge of a court of record, or if there be no such judge in the county at the time, then to a master in chancery, and if such judge or master shall be satisfied that sufficient cause is shown to require bail, he shall indorse an order under his hand, on such affidavit, directing the clerk of the court in which suit is about to be brought to issue a *capias ad respondendum*, directed to the proper officer to execute, for the arrest of the defendant or defendants in such proposed action; and the judge or master shall, in such order, fix the amount of the bail; and upon the filing of such affidavit and order, it shall be the duty of the clerk to issue a *capias*, and indorse thereon an order directing the sheriff, or officer to whom such process is directed, to hold the defendant to bail in the sum specified in such order, and the sheriff, or officer serving such process, shall take bail accordingly.¹

Actions sounding merely in damages.—The second section provides, that in actions sounding merely in damages, where the same can not be ascertained, the affidavit shall also set forth the nature and cause of the action, with the substantial or chief facts in relation thereto, and that the affiant verily believes that the benefit of whatever judgment may be obtained will be in danger of being lost unless the defendant is held to bail; and if upon examination thereof, the judge or

¹1 Starr & Curtis' An. Stat. 358; Rev. Stat. (1893) 190; Rev. Stat. (1895, 192,

master shall be satisfied that sufficient cause is shown to require bail, he shall make an order thereon, specifying in what amount the defendant shall be required to give bail, and like proceedings shall be had thereon as provided in section one of the same act, and the officer serving the process shall in like manner take bail.

Plaintiff to give bond.—The third section requires that the judge or officer ordering the issuing of such *capias* shall require bond of the plaintiff in a penal sum of double the amount sued for, with security to be approved by the clerk issuing the writ, conditioned that the plaintiff shall prosecute the *capias* with effect and without delay, and pay the defendant all costs and damages that may be sustained by the wrongful suing out of such *capias*. And no *capias* shall issue until such bond is approved and filed by such clerk.

Bail bond.—The fourth section provides, that where any writ shall have been issued from any court of record in the state, whereon bail is required, the sheriff or other officer to whom the same may be directed, shall take a bail bond to himself, with sufficient security, in the sum for which bail is required. The form of the condition of such bond is given in the same section, and is substantially the same as the condition of the “bail bond in civil actions” hereafter given. The bond so taken is to be returned with the writ, on or before the first day of the term of the court to which the writ is returnable. The officer making the arrest is required to give the person arrested reasonable time and opportunity to procure bail before committing him to jail.

No. 1. *Affidavit for capias ad respondendum, charging fraud, in action ex contractu.*

STATE OF ILLINOIS, }
 County of ——— } set. A. B., of ———, who is about to commence his
 action of (*assumpsit, or as the case may be*), in the ——— Court of the said
 county, against C. D. of ———, makes oath and says, that the said C. D. is
 justly indebted to this affiant in the sum of ——— dollars, for (*here set forth
 the cause of action particularly*) *. And this affiant further says, that the
 said C. D. (*here set forth facts showing that the defendant fraudulently
 contracted the debt, or incurred the obligation, respecting which the suit is
 about to be brought*). And this affiant further says, that he verily believes

the benefit of whatever judgment he may obtain in this behalf will be in danger of being lost, unless the said C. D. be held to bail.

A. B.

Subscribed and sworn, etc.

No. 2. Affidavit for capias, charging the defendant with concealing, assigning, removing, or disposing of his property, with intent to defraud the plaintiff.

(Commence as in No. 1, inserting these words at the *:) And this affiant further says that the said C. D. (here set forth facts showing that the defendant has concealed, assigned, removed or disposed of his property, as the case may be,) with the intent to defraud this affiant. And this affiant further says, that he verily believes the benefit of whatever judgment he may obtain in this behalf will be in danger of being lost, unless the said C. D. be held to bail.

A. B.

Subscribed, etc.

No. 3. Affidavit for capias, in action sounding merely in damages, etc.

STATE OF ILLINOIS, }
County of ———, } sct. A. B., of ———, who is about to commence his action of (trespass, or as the case may be,) in the ——— Court of the said county, against C. D., of ———, makes oath and says, that (here set forth the nature and cause of the action, with the substantial facts in relation thereto). And this affiant further says, that the amount of his damages can not be definitely stated, but he believes he has sustained damages in this behalf to the amount of ——— dollars. And this affiant verily believes that the benefit of whatever judgment he may obtain in his said suit will be in danger of being lost, unless the said C. D. be held to bail.

A. B.

Subscribed, etc.

In setting forth the facts in the affidavit, it is advisable to state them substantially as they are required to be set forth in a declaration. The above forms, Nos. 1 and 2, may be varied to suit any action arising *ex contractu*, and form No. 3 can be adapted to all actions *ex delicto*. Before the passage of the act in force July 1, 1872, the statute of Illinois did not go far enough to meet the requirements of the constitution.¹

It will be seen that the affidavit for a *capias* must be presented to a judge of a court of record, or if there is no such judge in the county at the time, then to a master in chancery; and if such judge or master shall be satisfied that sufficient

¹ *In re Smith*, 16 Ill. 347; *Gorton v. Frizzell*, 20 Ill. 291; *Parker v. Folsbee*, 45 Ill. 473.

cause is shown to require bail, he shall indorse an order, under his hand, on the affidavit, directing the clerk of the court in which suit is about to be brought to issue a *capias ad respondendum*, directed to the proper officer to execute, for the arrest of the defendant in such proposed action; and the judge or master shall in such order fix the amount of the bail. The judge or master ordering the issuing of such *capias* will require bond of the plaintiff in a penal sum of double the amount sued for, with security to be approved by the clerk issuing the writ.

Judge's order for a capias ad respondendum, to be indorsed on the affidavit.

Let a *capias ad respondendum* issue, directed to the sheriff of the county of —, for the arrest of C. D., within named, of whom the sheriff will take bail in the sum of — dollars. The within named A. B. will give bond in the sum of — (*double the amount sued for*) dollars, conditioned according to law.

(Date.)

E. F., Judge.

To G. H., Clerk of the — Court of the county of —.

The order to be made by a master in chancery may be the same as the above, except that it should commence as follows:

It appearing to the undersigned that there is no judge of a court of record in the county: Let, etc., etc.

O. R., Master in Chancery.

Bond to be given by the plaintiff before the issuing of the writ.

Know all men by these presents, that we, A. B., E. F. and L. M., of —, are held and firmly bound unto C. D., of —, in the penal sum of — dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals, and dated this — day of —, 18—.

The condition of this obligation is such, that whereas the above-bounden A. B. is about to sue out of the — Court of the county of —, in the State of Illinois, a writ of *capias ad respondendum*, in a plea of —, against the said C. D., returnable to the next term of the said court, to be held at —, on the — day of — next: Now if the said A. B. shall prosecute the said *capias* with effect, and without delay, and pay to the said C. D. all costs and damages that may be sustained by the wrongful suing

out of such *capias*, then this obligation shall be void; otherwise shall remain in full force.

A. B. [L. S.]

E. F. [L. S.]

L. M. [L. S.]

Taken and approved by me, this — day of —, 18—.

R. S., Clerk.

Bond to be taken by the sheriff from the defendant.

Know all men by these presents, that we, C. D. and E. F., of —, are held and firmly bound unto T. W., sheriff of the county of —, in the State of Illinois, in the penal sum of (*double the amount for which bail is required*) dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals, and dated this — day of —, 18—.

The condition of this obligation is such, that whereas one A. B., plaintiff, has lately sued out of the — Court of the county of — a certain writ of *capias ad respondendum*, in a certain plea of —, against the above-bounden C. D., defendant, returnable to the next term of the said court, to be holden at —, on the — day of — next: Now if the said C. D. shall be and appear at the said court, to be holden at —, on the — day of — next, and in case the said E. F. shall not be received as bail in the said action, shall put in good and sufficient bail, which shall be received by the said plaintiff, or shall be adjudged sufficient by the court, or, the said E. F. being accepted as bail, shall pay and satisfy the costs and condemnation-money which may be rendered against the said C. D. in the plea aforesaid, or surrender the body of the said C. D. in execution in case the said C. D. shall not pay and satisfy the said costs and condemnation-money, or surrender himself in execution when by law such surrender is required, then this obligation shall be void; otherwise shall remain in full force.

C. D. [L. S.]

E. F. [L. S.]

Affidavit of plaintiff's claim on contracts for payment of money.—Section 36 of the Practice Act provides, that "If the plaintiff in any suit upon a contract, expressed or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default unless the defendant or his agent or attorney, if the defendant is a resident of the county in which the suit is brought, shall file with his plea an

affidavit stating that he verily believes that he has a good defense to said suit, upon the merits, to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount (according to the best of his judgment and belief), upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order; no affidavit of merits need be filed with a demurrer or motion: *Provided*, that this section shall not apply to any case where an executor or administrator shall defend in behalf of an estate: *And provided further*, that if the plaintiff, his agent, or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merit, and that he believes that plaintiff has testimony to support his claim against the defendant, which he can not produce at that term of court, but expects to produce by next term, the court shall continue such cause until the next term."¹ The affidavit of the plaintiff's claim may be made by any one cognizant of the facts.²

An affidavit of plaintiff's claim on an account is to be taken as *prima facie* evidence of the amount due, unless the defendant files an affidavit of merits with his pleas.³ An affidavit of claim or merits may be filed with a distress warrant,⁴ or a declaration on an appeal bond.⁵

Form of affidavit to be filed with declaration.

(*Venue and title of cause as on page 6, ante.*)

A. B., of etc., makes oath and says that he is, etc. (*Here state whether he is plaintiff, agent, etc.*); that the demand of the plaintiff in the above entitled cause, is for, etc. (*state the nature of the demand*); and that there is due to the plaintiff from the defendant, after allowing to him all just credits, deductions and set-offs, the sum of — dollars.

A. B.

Subscribed and sworn to, etc.

¹ Rev. Stat. (1893), 1076; 2 Starr & Curtis 1801; Rev. Stat. (1895), 1160.

² *Wilder v. Arwedson*, 80 Ill. 435; *Brigham v. Atha*, 84 Ill. 43; *Young v. Browning*, 71 Ill. 44; *Haggard v. Smith*, 71 Ill. 226; *Garrity v. Lozano*, 83 Ill. 597; *C. D. & V. R. R. v. Bank*, 82 Ill. 493; *Haggard v. Smith*, 76 Ill. 507.

³ 2 Starr & Curtis 1804; Rev. Stat. (1893), 1076; Rev. Stat. (1895), 1160; *Coal Co. v. Field*, 17 Bradw. 260.

⁴ *Bartlett v. Sullivan*, 87 Ill. 219.

⁵ *Coursen v. Browning*, 86 Ill. 57; *Mestling v. Hughes*, 89 Ill. 389; *Myers v. Shoneman*, 90 Ill. 80.

The court, in its discretion, may allow an affidavit of plaintiff's claim to be filed after plea is filed, and may then strike plea from files, unless affidavit of merits is filed.¹ An affidavit of claim² or affidavit of merits³ may be amended.

The only effect of omission on the part of the plaintiff to file affidavit with declaration, is that the defendant may plead without verifying his plea.⁴

(See Affidavit of Merits, page 149, *post*.)

SECURITY FOR COSTS.

When required.—The statute provides, “that in all actions in any court of record on official bonds for the use of any person, actions on the bonds of executors, administrators or guardians, *qui tam* actions, actions on a penal statute and in all cases in law or equity, where the plaintiff, or person for whose use an action is to be commenced, shall not be a resident of this state, the plaintiff or person for whose use the action is to be commenced, shall, before he institutes such suit, file or cause to be filed, with the clerk of the court in which the action is to be commenced, security for costs.”⁵

The statute applies to a writ of error sued out of the supreme or appellate courts;⁶ it applies to attachment, as an attachment bond does not satisfy this statute;⁷ and to non-resident landlords issuing distress warrants for rent;⁸ but if an action is brought by a non-resident for the use of a resident;⁹ or by two plaintiffs, one of whom is a resident and solvent;¹⁰ or in a bastardy proceeding, no security for costs is required.¹¹ In an action brought in the name of the people for the use of a

¹ *Spradling v. Russell*, 100 Ill. 522; *Bailey v. Valley Bank*, 127 Ill. 332; *Trusedell v. Hunter*, 28 Ill. App. 292.

² *Peirson v. Hendrix*, 88 Ill. 34.

³ *Culver v. Johnson*, 90 Ill. 91.

⁴ *Kern v. Strassberger*, 71 Ill. 303.

⁵ 1 Starr & Curtis, 635; Rev. Stat. (1893) 394; Rev. Stat. (1895) 432; *Randolph v. Emerick*, 13 Ill. 345; *Smith v. Robinson*, 11 Ill. 119; *Caton v. Harmon*, 1 Scam. 581; *Hickman*

v. Haines, 5 Gilm. 21; *Adams v. Miller*, 14 Ill. 71; *Wood v. Goss*, 24 Ill. 627; *Whitehurst v. Coleen*, 53 Ill. 247; *Kolbe v. People*, 85 Ill. 336.

⁶ *Roberts v. Eahs*, 32 Ill. 474; *Ripley v. Morris*, 2 Gilm. 381; *Hickman v. Haines*, 5 Gilm. 20.

⁷ *Casey v. Horton*, 36 Ill. 234.

⁸ *Lapointe v. Stewart*, 16 Ill. 291.

⁹ *Caton v. Harmon*, 1 Scam. 581.

¹⁰ *Wood v. Goss*, 24 Ill. 627.

¹¹ *Kolbe v. People*, 85 Ill. 336.

county to recover a penalty for obstructing a public highway no bond for costs is necessary.¹

Suits by minors by next friend.—In section 18 of chapter 64, entitled "Guardian and Ward,"² it is provided that suits may be commenced by any minor by his next friend, on such next friend entering into bond for costs, and filing the same in the court where such action may be instituted. An action brought by the next friend of an infant without an order of appointment or the filing of a bond for costs, will not be dismissed if such bond be given when so ordered by the court. The giving of the bond for costs is not a jurisdictional matter.³

Form of security for costs.—The statute requires that the security to be given before the commencement of the suit, shall be substantially in the following form:

A. B. }
vs. } (*Title of Court.*)
 C. D. }

I (E. F.) do enter myself security for all costs which may accrue in the above cause.

Dated this — day of —, A. D. 18—.

(Signed) E. F.⁴

Surety—Approval and effect of bond.—Such instrument is required to be signed by some responsible person, a resident of this state, to be approved by the clerk, and binds such person to pay all costs which may accrue in such action, either to the opposite party, or to any of the officers of the court in which the action is commenced, or to which it may be removed by change of venue or appeal.⁵ A bond for costs covers all costs without reference to the person to whom they may accrue.⁶ It was held under a former statute, that the security is not bound for costs made against his principal in the supreme court on appeal.⁷

Dismissal for want of security for costs.—If a suit is com-

¹ *People v. Coultas*, 9 Bradw. 39.

² 1 Starr & Curtis, 1241; Rev. Stat. (1893) 792; Rev. Stat. (1895) 841.

³ *Railroad Co. v. Latimer*, 128 Ill. 163.

⁴ 1 Starr & Curtis, 635; Rev. Stat. (1893), 394; Rev. Stat. (1895) 432.

⁵ 1 Starr & Curtis, 636; Rev. Stat. (1893), 394; Rev. Stat. (1895), 432.

⁶ *Whitchurst v. Coleen*, 53 Ill. 247.

⁷ *Clark v. Quackenboss*, 28 Ill. 112.

menced without filing such security, the court on motion will dismiss the suit at the cost of the attorneys, unless such security shall be filed within such time as shall be allowed by the court, and when so filed, it will relate back to the commencement of the suit; and the right to require security for costs will not be waived by any pleading or other proceeding in the case;¹ but a lack of a bond for costs can not be objected to for the first time in the supreme or appellate court.²

Motion to dismiss for want of security for costs.—To support a motion to dismiss a suit for want of security for costs, on the ground that the plaintiff was a non-resident, the defendant must file an affidavit, sufficient to negative the fact that the plaintiff, or person for whose use the suit is brought, was a resident at the time of the commencement of the suit.³

Rule to file security.—Upon a motion to dismiss a suit for want of security for costs, if the plaintiff is shown to have been a non-resident at the time of the commencement of the suit, the court will enter a rule on the plaintiff to file security within such time as may be fixed by the court. The suit should not be dismissed without giving such time.⁴

Where the motion is based on the ground that the action is upon a penal statute, and that no security was given, the court may permit the plaintiff to file a bond for costs, after a motion to dismiss for want of such security.⁵

Cross-motion.—On a motion to dismiss for want of security for costs, the better practice is for the plaintiff to file a cross-motion for leave to supply such security and it will be granted.

Objections to security.—Where the security to a bond for costs is objected to, it is incumbent on the party presenting it to satisfy the court, by competent proof, that it is sufficient.⁶

After action brought.—In regard to security for costs after action brought, the statute provides that, "if at any time after

¹ 1 Starr & Curtis, 637; Rev. Stat. (1893), 394; Rev. Stat. (1895), 432; *Kimbark v. Blundin*, 6 Brad. 539.

² *Meyer v. Wiltshire*, 92 Ill. 395.

³ *Leadbeater v. Roth*, 25 Ill. 587; *Buckland v. Goddard*, 36 Ill. 208;

O'Connell v. Rea, 51 Ill. 306; *Johnson v. Huber*, 134 Ill. 511.

⁴ *Lee v. Waller*, 13 Brad. 403.

⁵ *Richards v. People*, 100 Ill. 390; *Baker v. Palmer*, 83 Ill. 568.

⁶ *Buckmaster v. Beames*, 3 Gilm. 97.

the commencement of any suit by a resident of this state, he shall become non-resident, or if in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court, with respect to their legal demands, it shall be the duty of the court, on motion of the defendant or any officer of the court, to rule the plaintiff, on or before a day in such rule named, to give security for the payment of costs in such suit; if such plaintiff shall neglect or refuse, on or before the day in such rule named, to file an instrument of writing of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, the court shall, on motion, dismiss the suit, *provided*, that the defendant or officer making such motion shall file therewith his affidavit or the affidavit of some credible person, stating that he has reason to believe, and does believe, that in case such suit is prosecuted to a conclusion, a judgment will be rendered against such plaintiff for such costs.”¹

The motion for a rule on the plaintiff to give security for costs is usually based upon the affidavit of the defendant, or the officer or person at whose instance the application is made, setting forth the ground upon which the rule is asked. Such affidavit may be as follows:

Affidavit for rule to give security for costs.

In the ——— court.

C. D.	}	<i>Assumpsit.</i>
<i>ats.</i>		
A. B.	}	C. D., the above named defendant, makes oath and says, that A. B., the plaintiff above named, is unable to pay the costs of this suit (<i>or state any other ground mentioned in the statute</i>); affiant further states that he has reason to believe, and does believe, that in case said cause is prosecuted to a conclusion, a judgment will be rendered against the plaintiff for such cost.

C. D.

Subscribed and sworn, etc.

The plaintiff may file a counter affidavit, denying the insolvency, or other matter; and in that case, it seems, the rule will

¹ Starr & Curtis, 637; Rev. Stat. (1893), 394; Rev. Stat. (1895), 432.

be discharged.¹ Such motions are addressed to the discretion of the courts, and their decisions thereon can not in general be assigned for error;² but if the affidavit in support of the motion is insufficient, the court has no power under the statute to grant the rule, and if it does so, its decisions may be reviewed in an appellate court.³ Motions of this kind, it is said, are not regarded very favorably by the courts, and slight evidence has usually been held sufficient to discharge the rule.

Upon a motion for a rule upon the plaintiff to file additional security for costs, an affidavit is insufficient which only avers the insolvency of the plaintiff and his surety. It should show, in addition, that the circumstances of the principal or surety have changed since the approval of the former security.⁴

On an appeal by the defendant from a judgment of a justice of the peace, an appellate court will not grant a rule on the plaintiff to give security for costs.⁵ After the cause has been called for trial, a motion for a rule to give security for costs comes too late, even though the affidavit sets forth that the affiant has just learned that the plaintiff is insolvent.⁶

Where an action is brought in the name of one person for the use of another, and the defendant moves for a rule to give security for costs, it is not sufficient for the affidavit to show the insolvency or non-residence of the nominal plaintiff, but it must also show that the beneficial plaintiff is insolvent or non-resident.⁷

If security for costs is given after action is brought, the form of the instrument may be as follows:

¹ *Hamilton v. Dunn*, 22 Ill. 259; *Papineau v. Belgarde*, 81 Ill. 61.

² *Selby v. Hutchinson*, 4 Gilm. 319; *Gesford v. Critzer*, 2 Gilm. 698; *Clement v. Brown*, 30 Ill. 43; *Railroad Co. v. South*, 43 Ill. 176; *O'Connell v. Rea*, 51 Ill. 306.

³ *Ball v. Bruce*, 27 Ill. 332; *Teague v. Wells*, Breese. 377; *Rockford v. Russell*, 9 Bradw. 229; *Twining v. Martin*, 65 Ill. 157.

⁴ *Ball v. Bruce*, 27 Ill. 332.

⁵ *Teague v. Wells*, Breese. 377; *Campbell v. Giblin*, 19 Ill. 54; *Adams v. Miller*, 12 Ill. 28.

⁶ *Railroad Co. v. South*, 43 Ill. 176. *Edwards v. Helm*, 4 Scam. 143; *Frazer v. Zimmerly*, 25 Ill. 184; *Caton v. Harmon*, 1 Scam. 581.

⁷ *O'Connell v. Rea*, 51 Ill. 306.

Security for costs.

In the ——— Court.

A. B.	}	<i>Assumpsit.</i>
vs.		
C. D.		I hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which have accrued, or may accrue, in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this state.

Dated this ——— day of ———, 18—.

E. F.

Plaintiff a poor person.—The statute provides as follows :
 “ If any court shall, before or after the commencement of any suit, be satisfied that the plaintiff is a poor person, and unable to prosecute his suit, and pay the costs and expenses thereof, the court may, in its discretion, permit him to commence and prosecute his action as a poor person; and thereupon such person shall have all the necessary writs, process and proceedings, as in other cases, without fee or charge. The court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without any fees, charge or reward; if judgment be entered for the plaintiff, there shall be judgment for his costs, which costs shall be collected for the use of the said officers.”¹

Allowing the plaintiff to sue as a poor person, or requiring security for costs, is discretionary with the trial court.² This section is broad enough in its terms to include all resident plaintiffs, whether they be adults or minors, who are poor persons, and are unable to prosecute their suits and pay costs and expenses.³

Affidavit of poor person.—The statute also provides that
 “ If, prior to the convening of any term of any court of record, a person desiring to commence suit in such court, shall file with the clerk thereof an affidavit stating that he is a poor person and unable to pay costs, and that his cause of action is meritorious, such clerk shall issue and the sheriff shall serve all necessary process, without requiring costs.”

A motion for leave to prosecute as a poor person, under this

¹ 1 Starr & Curtis, 638; Rev. Stat. (1893), 395; Rev. Stat. (1895), 433.

² *Clement v. Brown*, 30 Ill. 43; *Rockford v. Russell*, 9 Bradw. 229.

³ *R. R. Co. v. Lane*, 130 Ill. 116.

section, should be supported by an affidavit, which may be as follows:

Affidavit on motion for leave to prosecute as a poor person.

(*Venue, and title of cause.*)

A. B., the above named plaintiff, makes oath and says, that he is a poor person, and unable to prosecute his suit in this behalf, and pay the costs and expenses thereof; that he is, etc. (*here insert any other fact showing the plaintiff's inability to give security or to pay costs*); that he has reason to believe, and does believe that he has a meritorious cause of action and that he will recover a judgment against the defendant.

A. B.

Subscribed and sworn to, etc.

Permitting a plaintiff to sue as a poor person is generally a matter within the discretion of the court.¹

PARTIES TO AN ACTION.

A suit must be brought by the party who has the legal interest,² and in his own name.³ Courts of law will not inquire whether plaintiff sues for himself or as trustee; it is sufficient that he has a legal interest.⁴ When a suit is brought by the party holding the legal interest, the action can not be defeated by showing that another person is entitled to the proceeds.⁵ An action for a breach of contract must be brought by the party with whom the contract was made.⁶ By whatever name a person may contract, he may, notwithstanding, sue and be sued by his right name.⁷

Where a number of persons associated in business are known to the world and transact business by a particular name, in a

¹ *Clement v. Brown*, 30 Ill. 43; *Rockford v. Russell*, 9 Bradw. 229; *Sterling v. Pearl*, 80 Ill. 251; *Papineau v. Belgarde*, 81 Ill. 61.

² *Chadsey v. Lewis*, 1 Gilm. 153; *Manlove v. McHatton*, 4 Scam. 96; *Simons v. Waterman*, 17 Ill. 371; *Dix v. Ins. Co.*, 22 Ill. 272; *Moore v. Maple*, 25 Ill. 341; *Ins. Co. v. Frost*, 37 Ill. 333; *Larned v. Carpenter*, 65 Ill. 543; *Coal Co. v. Long*, 91 Ill. 617; *Dinet v. Reilley*, 2 Bradw. 316.

³ *Kyle v. Thompson*, 2 Scam. 432; *Richards v. Betzer*, 53 Ill. 466; *Newman v. Ravenscraft*, 67 Ill. 496; *Caldwell v. Lawrence*, 84 Ill. 161.

⁴ *Lee v. Pennington*, 7 Bradw. 247; *Chapin v. Foss*, 75 Ill. 280.

⁵ *Lohman v. Bank*, 87 Ill. 616.

⁶ *Corbett v. Schumacker*, 83 Ill. 403.

⁷ *Steinfeld v. Taylor*, 51 Ill. App. 399.

suit against the members, they may be described as members of an association of that name, and they can not defeat a recovery by showing that in their articles of association they adopted a different name.¹ In the case of a simple contract, an undisclosed principal may bring an action in his own name, where the agent contracts personally.² Judicial proceedings commenced and prosecuted in the name of a deceased person are a nullity.³ An executor or administrator may sue as such, as well as in his own name, upon a contract made with him in his representative capacity. In either case, the sum recovered will be held to be for the benefit of the estate.⁴

All persons who are partners in a firm at the time a contract is made, must, unless there be a legal excuse for not joining them, be joined in an action to enforce its payment. If a partner be dead, the plaintiff suing must allege it as an excuse for not joining him.⁵

Suits for the use of another.—The assignee of a chose in action can only maintain a suit at law in the name of the assignor, for his use.⁶ A party for whose benefit a promise is made may maintain an action upon a simple contract in his own name, although the consideration does not move from him.⁷ But it has been held that where the contract is under seal, the action must be in the name of the obligee, although the agreement may be for the use of another.⁸

A party in whom is the legal right of action may, as respects the defendant, bring his suit for the use of whatever person he likes. It is no concern of the defendant for whose use the action is brought, nor is it necessary that the person

¹ *Boggs v. Olcott*, 40 Ill. 303.

² Chit. Pl. 9; *Turnpike v. Whiting*, 10 Mass. 328; 1 Pars. Cont. 62; *Conklin v. Leeds*, 58 Ill. 178; *Saladin v. Mitchell*, 45 Ill. 79; *R. R. Co. v. Walsh*, 85 Ill. 58.

³ *Risley v. Fellows*, 5 Gilm. 531; *Mills v. Bland*, 76 Ill. 381; *Camden v. Robertson*, 2 Scam. 507.

⁴ *Miller v. Kingsbury*, 128 Ill. 45.

⁵ *Dement v. Rokker*, 126 Ill. 174.

⁶ *Carlyle v. Carlyle*, 140 Ill. 445;

Ins. Co. v. Ludwig, 103 Ill. 305; *Knight v. R. R. Co.*, 141 Ill. 110.

⁷ *Crandall v. Payne*, 154 Ill. 627; *Moore v. Clark*, 77 Ill. 471; *Bristow v. Lane*, 21 Ill. 194; *Paper Co. v. Serman*, 29 Ill. App. 68.

⁸ *Gautzert v. Hoge*, 73 Ill. 30; *Moore v. House*, 64 Ill. 162; *Boals v. Nixon*, 26 Ill. App. 517; but see *Harms v. McCormick*, 30 Ill. App. 125.

for whose use the action is brought should have any interest or connection otherwise with the subject-matter of the suit.¹

The fact that one person sues for the use of another does not make the person for whose use the suit is brought a party to it, nor is the judgment rendered a judgment in his favor.² The fact that a suit is brought for the use of a third person need not be expressed in the record.³

Suits against insane persons.—Jurisdiction of an insane person may be acquired by the courts in the same manner as jurisdiction of a sane person.⁴ Where an insane person is properly brought before the court by personal service, the judgment rendered against him will be as valid and binding as any other judgment, and is said to be neither void nor voidable.⁵ By the statute, the conservator of a lunatic is empowered to bring suit in his own name, as conservator, for demands due his ward.⁶ But until the appointment and qualification of a conservator for an insane person, a suit may be brought in the name of such insane person.⁷

The statute also provides that the court may in its discretion appoint a next friend for a particular purpose, notwithstanding there is already a conservator possessing general authority.⁸

Suits against infants.—The statute provides that the guardian of an infant shall appear for and represent his ward in all suits or proceedings, unless another person is appointed for that purpose as guardian or next friend, provided that any court shall have power to appoint or allow any person, as next friend for a minor, to commence and prosecute a suit in his behalf.⁹ The court is clothed with a discretion in appointing or allowing one other than the guardian to institute a suit on

¹ *Tedrick v. Wells*, 59 Ill. App. 657;
Edwin v. Cox, 61 Ill. App. 567;
Ins. Co. v. Barnish, 59 Ill. App. 78.

² *Morse v. Goetz*, 51 Ill. App. 485;
Northrop v. McGee, 20 Ill. App. 108.

³ *Ex. Co. v. Hazzard*, 37 Ill. 465.

⁴ *Noel v. M. W. A.*, 61 Ill. App. 597; *Freeman on Judgments*, Sec. 123.

⁵ *Maloney v. Dewey*, 127 Ill. 395.

⁶ 2 Starr & Curtis, 1577; *Rev. Stat.* (1893), 954; *Rev. Stat.* (1895), 1016.

⁷ *R. R. Co. v. Munger*, 78 Ill. 300.

⁸ 2 Starr & Curtis, 1577; *Rev. Stat.* (1893), 954; *Rev. Stat.* (1895), 1016;
Ryder v. Tapping, 15 Bradw. 216.

⁹ 1 Starr & Curtis, 393; *Rev. Stat.* (1893), 217; *Rev. Stat.* (1895), 218.

behalf of an infant. This discretion is necessary to prevent many suits in reference to the same subject-matter being brought in behalf of an infant.⁹

PROCESS FOR APPEARANCE.

Summons—Form—When returnable.—Section 1 of the Practice Act provides that the first process in all actions shall be a summons directed to the sheriff of the county (or if the sheriff be interested in the suit, to the coroner) and shall be made returnable on the first day of the next term of the court to which the action may be commenced. That if ten days shall not intervene between the time of suing out the summons and the next term of court, it shall be made returnable to the succeeding term, and that the plaintiff may, in any case, have summons made returnable at any term of the court which may be held within three months after the date thereof.¹ A summons made returnable eight terms after date is void.² It must be under seal,³ and contain the names of all the plaintiffs;⁴ and when the summons is dated less than ten days before the return day it is void.⁵ When a summons is held void it will be quashed on motion.⁶

How served.—Section 3 provides that it shall be the duty of the sheriff to serve all process of summons, when practicable, ten days before the return day thereof, and to make return thereof by or on the return day, with an indorsement of his service and the time of serving it.⁷ The statutory requirements for service of process must be strictly complied with, and the return of the officer should show such compliance, otherwise the court will not obtain jurisdiction.⁸

The mode of service of summons, where not otherwise pro-

⁹ *Patterson v. Pullman*, 104 Ill. 80.

¹ *Starr & Curtis*, 1771; *Rev. Stat.* (1893), 1070; *Rev. Stat.* (1895), 1154; *Edwards v. Haring*, 59 Ill. App. 147.

² See *Hochlander v. Hochlander*, 73 Ill. 618.

³ *Garland v. Britton*, 12 Ill. 232.

⁴ *Richardson v. Thompson*, 41 Ill. 202; *Miller v. Handy*, 40 Ill. 448.

⁵ *Carter v. Rodewold*, 108 Ill. 351.

⁶ *Hannum v. Thompson*, 1 Scam. 238; *Anglin v. Nott*, 1 Scam. 395.

⁷ *2 Starr & Curtis*, 1775; *Rev. Stat.* (1893), 1071; *Rev. Stat.* (1895), 1155; *French v. Regan*, 58 Ill. App. 261.

⁸ *Greenwood v. Murphy*, 131 Ill. 604.

vided by statute, is by reading the same to the defendant, and the service by delivering a copy thereof to the defendant without reading is insufficient.¹ Where a summons is read in the hearing of a defendant, though the officer addressed himself to his clerk, both the clerk and he being aware of the officer's mistake, it was held, that as what is read in the hearing of several persons is read to all of them, even though the reader addresses only one especially, the service was sufficient.²

Alias writs.—Section 8 provides that whenever it shall appear by the return of the sheriff that the defendant is not found, the clerk shall at the request of the plaintiff issue another, and so on until service is had.³

Corporations—How served.—It is provided by section 4 of the Illinois Practice Act, that "An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county; and in case the proper officer shall make return upon such process that he can not in his county find any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any other agent of said company, then such company may be notified by publication and mail in like manner and with like effect, as is provided in sections twelve and thirteen of an act entitled 'An act to regulate the practice in courts of chancery.' "

It has been held that the foregoing section is to be so construed as to render it in harmony with section 2 of the Practice Act, and does not authorize service on a corporation by publication, except in the county where it has its residence.⁴ The vice-president of a corporation is an "agent," within the meaning of the statute, and process against the corporation may be served upon him as such.⁵

¹ *Law v. Grommes*, 158 Ill. 492.

⁴ *Coal Co. v. Hughes*, 45 Ill. App.

² *Metzger v. Huntington*, 51 Ill. 566.

App. 377.

⁵ *Cook v. Building Co.*, 152 Ill. 638.

³ 2 Starr & Curtis, 1779; Rev. Stat. (1893), 1072; Rev. Stat. (1895), 1156.

A general solicitor of a corporation is a person not named in the statute providing for service of process upon corporations.¹ When a corporation has suffered a person to hold himself out to the public as its agent, so as to render it inequitable for the apparent agency to be denied, service of process upon such agent will be sufficient.² It has been held that where process is returned served upon one as the agent of a corporation, the agency may be denied by plea in abatement.³

On receiver of corporation.—It is provided in an act entitled “An act in regard to the serving of process on Receivers of Corporations,” in force July 1, 1887:

“That the receiver or receivers of any incorporated company may be served with process, by leaving a copy of such process with such receiver or receivers, if he or they can be found in the county in which the suit is brought; if he or they shall not be found in the county, then by leaving a copy of such process with any clerk, secretary, superintendent, general agent, engineer, conductor, station agent or any agent in the employ of such receiver or receivers, who may be found in the county in which such suit is brought.”⁴

On trustee of railroad.—Section 1 of paragraph 103 of the Practice Act provides that a trustee or trustees operating, managing, or controlling a railway may be served with process by leaving a copy of such process with such trustee or trustees, if he or they can be found in the county in which the suit is brought; if he or they shall not be found in the county, then by leaving a copy of such process with any clerk, secretary, superintendent, general agent, engineer, conductor, station agent, or any agent in the employ of such trustee or trustees who may be found in the county in which such suit is brought.⁵

Privileges of defendant.—It is a principle as old as the common law, that all persons who, in the discharge of their

¹ *R. R. Co. v. Pairpoint Mfg. Co.*, 55 Ill. App. 231.

² *Combs v. Oil Co.*, 58 Ill. App. 123.

³ *R. R. Co. v. Keep*, 22 Ill. 9; *Bank*

v. Bank, 90 Ill. 56; *Lanza v. McNulta*, 46 Ill. App. 69.

⁴ Rev. Stat. (1893), 1072.

⁵ Rev. Stat. (1893), 1086; Rev. Stat. (1895), 1170.

duty, are in attendance upon courts of justice, and in going to and returning therefrom, are exempt from *arrest* on civil process. This is a privilege which extends alike to parties, witnesses, attorneys, jurors, and all others who are assisting in the administration of justice; and this immunity does not extend alone to persons who are in the immediate presence of the courts themselves, but to those also who are in attendance upon subordinate tribunals, and officers appointed by the courts to assist them in the discharge of their duties. Thus, it is held to extend to a party attending the execution of a writ of inquiry;¹ to a witness attending before a magistrate to give his deposition under a rule of court;² to a witness attending before a commissioner for a like purpose;³ to a creditor or witness attending commissioners of a bankrupt;⁴ to witness before arbitrators;⁵ and to a party attending a reference under a rule of court.⁶

A party while engaged in taking depositions to be used in his suit in another state, and for such time thereafter as is necessary to return to his home in that state, is not privileged from the service of a summons.⁷

The exemption is alike the privilege of the person and the privilege of the court, and it is designed to render the administration of justice free and unstranded, and to protect from improper influence all who are concerned in it.⁸

The weight of authority seems to be clearly in favor of the proposition that as regards this privilege, there is no difference between writs of *capias ad respondendum* and writs of summons, but that the exemption extends to both alike.⁹

The return.—The return of the service of a summons, except when otherwise provided by the statute, must show the

¹ *Walters v. Rees*, 4 Moore 34;
Atchison v. Morris, 11 Bissell 191.

² *United States v. Edme*, 9 Serg. & Rawle 147.

³ *Holmes v. Morgan*, 1 Phila. 217.

⁴ *Ex parte King*, 7 Vesey 312; *Ex parte Byne*, 1 Ves. & B. 316.

⁵ *Sandford v. Chase*, 3 Cowen 381;
Randall v. Guney, 1 Chitty R. 679.

⁶ *Clark v. Grant*, 2 Wend. 256.

⁷ *Greer v. Youngs*, 120 Ill. 184.

⁸ *Greer v. Youngs*, 120 Ill. 184.

⁹ *Hayes v. Shields*, 2 Yeates 222;
Bolton v. Martin, 1 Dall. 296; *Milles v. McCullough*, 1 Binney, 77; *Dugan v. Miller*, 8 Vroom 782; *Greer v. Youngs*, *supra*.

time when, upon whom, and how the service was made. A return, stating that the summons has been duly served on "C. D." according to law, is not sufficient.¹

The service must be made strictly in accordance with the statute, and so shown by the returns of the officer, or the court will not have jurisdiction of the person.² Where service is by summons, parol evidence will not be heard to prove or to aid it.³ A return of service "on the within named defendant," not giving the name, there being two defendants named in the summons, is insufficient.⁴

THE DECLARATION.

The province of the declaration is to exhibit on the record the grounds of the plaintiff's cause of action, as well for the purpose of notifying the defendant of the precise character of those grounds, as of regulating the plaintiff's proofs. When it performs such office in such a manner as to leave no doubt in the mind of the defendant, either as to the nature or origin of the plaintiff's claim, it ought not, on principle, to be adjudged insufficient;⁵ but it must, in every case, contain a full and explicit statement of the material facts upon which a recovery is sought.⁶

Each count in a declaration must truly set out the cause of action, and if the evidence does not sustain it, the action as to such count fails.⁷ It is proper for the pleader to state what is in reality the same cause of action, in several counts of his

¹ *Ball v. Shattack*, 16 Ill. 299; *Wilson v. Greathouse*, 1 Scam. 174, 176; *Bellingall v. Gear*, 3 Scam. 575; *Miller v. Handy*, 40 Ill. 448.

² *Cost v. Rose*, 17 Ill. 276; *Boylaud v. Boylaud*, 18 Ill. 551; *Miller v. Mills*, 29 Ill. 431; *Fisher v. Fisher*, 54 Ill. 231; *Greenwood v. Murphy*, 131 Ill. 604.

³ *Botsford v. O'Connor*, 57 Ill. 72; *Reedy v. Canfield*, 159 Ill. 260.

⁴ *Whitman v. Fisher*, 74 Ill. 147.

⁵ *Cook v. Scott*, 1 Gilm. 333; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *White*

v. Thomas, 39 Ill. 227; *I. C. R. R. Co. v. McKee*, 43 Ill. 119; *People v. Lane*, 36 Ill. App. 649.

⁶ *I. C. R. R. Co. v. McKee*, 43 Ill. 119; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Dole v. Clow*, 21 Ill. App. 477; *R. R. Co. v. Friedman*, 146 Ill. 583.

⁷ *Mastin v. Tomeray*, 2 Scam. 216; *Crittenden v. French*, 21 Ill. 598; *Boynton v. Robb*, 41 Ill. 349; *Roberts v. Corby*, 86 Ill. 182; *Brown v. Burnett*, 10 Bradw. 279; *Porter v. Drennan*, 13 Bradw. 362.

declaration, the purpose being to meet the varying phases of the evidence. When this is done, the counts are to be regarded as distinct from each other, and by apt reference, or otherwise, must state a complete cause of action,¹ and the plaintiff will be entitled to recover, if he proves, by a preponderance of the evidence, either ground of action.² Two distinct causes of action can not be set up in a single count of the declaration;³ but as many distinct facts as may be necessary to present one cause of action may be set forth in one count.⁴

Variance.—The defendant has the right to insist that the grounds upon which the plaintiff claims the right to recover shall be clearly and concisely stated, and that the case made in the declaration shall be proven as alleged. One cause of action can not be alleged and a different one proved, over the defendant's objection made in proper time.⁵

Under our present practice to present the question of variance between the allegations and proof, the evidence must be objected to at the time it is offered on that ground, or, when the variance becomes apparent, the party should move to exclude the evidence, or in some other appropriate way raise that question, so that the trial court can pass upon it; and to properly raise the question in any of these modes, the variance should be distinctly pointed out, so as to enable the trial court to pass upon it understandingly, and enable the plaintiff to obviate the objection by amendment.⁶

Additional counts.—Under section 24 of the Practice Act, additional counts may be filed at any time before final judgment, by leave of court.⁷

¹ *R. R. Co. v. Hessions*, 150 Ill. 546.

² *R. R. Co. v. Clough*, 134 Ill. 586;

³ *R. R. Co. v. Hill*, 29 Ill. App. 582; *R. R. Co. v. Ingraham*, 131 Ill. 665.

⁴ *White v. Clages*, 32 Ill. 325; *Hereford v. Crox*, 3 Scam. 423; *Ins. Co. v. Wuster*, 75 Ill. 285.

⁵ *R. R. Co. v. Friedman*, 146 Ill. 583.

⁶ *Libby v. Scherman*, 146 Ill. 540; *Richelieu v. Enc. Co.*, 140 Ill. 248;

Waidner v. Pauly, 141 Ill. 442; *City v. Moore*, 139 Ill. 201; *Foltz v. Hardin*, 139 Ill. 405; *Schoot v. Youree*, 142 Ill. 233; *Turnkey v. Hedstrom*, 131 Ill. 204; *R. R. Co. v. Colton*, 140 Ill. 486.

⁷ 2 Starr & Curtis, 1787; Rev. Stat. (1893), 1074; Rev. Stat. (1895), 1158; *Mutual Aid v. Paine*, 122 Ill. 625; *Meinke v. Nelson*, 56 Ill. App. 269.

Time for filing.—By section 17 of the Practice Act, it is provided that “If the plaintiff shall not file his declaration, together with a copy of the instrument of writing or account on which the action is brought, in case the same be brought on a written instrument or account, ten days before the court at which the summons or *capias* is made returnable, the court, on motion of the defendant, shall continue the cause at the cost of the plaintiff, unless it shall appear that the suit was commenced within ten days of the sitting of the court, in which case the cause shall be continued without costs, unless the parties shall agree to have a trial; and if no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to a judgment, as in case of a non-suit: *Provided*, that in all suits by *capias*, where the defendant shall have been arrested, and in replevin and attachment, the plaintiff may be required to file his declaration at the first term, and the defendant may have a trial at such term, unless sufficient cause for a continuance is shown.”¹

Copy of instrument or account sued on.—If the document sued on is set out in *hæc verba* in the declaration, an additional copy is not necessary to be filed.² If the declaration contains a special count on a promissory note or bill of exchange, etc., and common counts, and if the plaintiff stipulates that he will rely alone on the instrument described, no accounts need be filed under common counts.³ In such case the defendant will be prevented from denying the execution of the instrument, except by a verified plea;⁴ or from setting up a want or failure of consideration except by a special plea.⁵

A copy of document sued on is no part of the declaration,⁶ and a variance between the copy and the original itself, offered in

¹ 2 Starr & Curtis 1783; Rev. Stat. (1893), 1073; Rev. Stat. (1895), 1157.

² *Benjamin v. Delahay*, 2 Scam. 574; *People v. Pearson*, 1 Scam. 458.

³ *People v. Pearson*, 1 Scam. 458; *Childs v. Fisher*, 52 Ill. 205; *McCarthy v. Neu*, 91 Ill. 127; *Boyle v. Carter*, 24 Ill. 49.

⁴ *Childs v. Fisher*, 52 Ill. 205; *McCarthy v. Neu*, 91 Ill. 127.

⁵ *Wilson v. King*, 83 Ill. 232.

⁶ *Bogardus v. Trial*, 1 Scam. 63; *Harlan v. Boswell*, 15 Ill. 56; *Franey v. True*, 26 Ill. 184; *Gage v. Lewis*, 68 Ill. 604; *Humphrey v. Phillips*, 57 Ill. 132.

evidence, is no ground for excluding the latter.¹ If a suit is on a judgment, a copy of the record must be filed with the declaration.² To make a copy of the instrument sued on a part of the declaration, so that the court may notice it for any purpose, the defendant must craveoyer.³

Continuance.—The Practice Act provides, that “if the plaintiff shall not file his declaration, together with a copy of the instrument of writing or account on which the action is brought, in case the same be brought on a written instrument or account, ten days before the court at which the summons or capias is made returnable, the court on motion of the defendant shall continue the cause at the cost of the plaintiff.”⁴

Under this provision it is held that if the declaration is not filed ten days before the term, the defendant may appear and have the cause continued at the plaintiff's costs; but if the defendant does not apply for such continuance the cause will be continued generally and the costs will abide the result of the suit.⁵

If a copy of the instrument or account sued on is not filed ten days before the term, the defendant may obtain a continuance; but if he goes to trial without objection,⁶ or pleads to the action,⁷ he can not afterward take advantage of the failure to file such copy. The defendant is not compelled to appear at the first term and ask for a continuance.⁸

Where common counts are added to a special count, a failure to file a copy of the account sued on under the common counts will be a ground for a continuance, unless the plaintiff stipu-

¹ *Archer v. Clafin*, 31 Ill. 317; *Stratton v. Henderson*, 26 Ill. 68; *Flax Co. v. Beebe*, 48 Ill. 138.

² *Jefferson v. Alexander*, 84 Ill. 278.

³ *Sims v. Hugby*, Breese 413; *People v. Pace*, 57 Ill. App. 674.

⁴ Rev. Stat. (1893), 1073; Rev. Stat. (1895), 1157; 2 Starr & Curtis, 1783, *Collins v. Tuttle*, 24 Ill. 623; *Craft v. Turney*, 25 Ill. 324; *Hawthorn v. Cooper*, 22 Ill. 225; *Hopkins v. Woodward*, 75 Ill. 62; *Slade v. McClure*,

76 Ill. 319; *Ins. Co. v. Stayart*, 79 Ill. 259; *Moody v. Thomas*, 79 Ill. 274; *Wilson v. King*, 83 Ill. 232; *Copper Co. v. Barry*, 56 Ill. App. 587.

⁵ *Collins v. Tuttle*, 24 Ill. 623; *Jefferson v. Alexander*, 84 Ill. 278.

⁶ *Stratton v. Henderson*, 26 Ill. 68; *Kimball v. Kent*, 2 Scam. 217.

⁷ *Grier v. Gibson*, 36 Ill. 521; *McCarthy v. Mooney*, 41 Ill. 300.

⁸ *Herring v. Quimby*, 31 Ill. 153.

lates that he relies only on the instrument sued on, or enters a *nolle prosequi* as to the common counts.¹

If a suit is brought by the indorsee of a negotiable instrument it is not necessary to file copy of the indorsement to prevent a continuance. The instrument sued on being the note or bill of exchange, and not the indorsement.² So, where the defendants are sued as guarantors of a promissory note, a copy of the note, showing the names of defendants as indorsers, is a sufficient copy of the instrument sued upon. The plaintiff is authorized to fill in the blank over the names at the trial.³

Dismissal at second term, where no declaration is filed.—

If no declaration is filed ten days before the second term of the court, the defendant will be entitled to a judgment, as in a case of non-suit.⁴ The statute is construed to mean the next term after that for which the service is in time.⁵

The objection, being in abatement only, and not in the bar of the suit, must be made before any steps are taken to defend the suit upon its merits.⁶ A suit should not be dismissed at the second term for failure to file a copy of account, until the plaintiff has been ruled to file the same, and has failed to comply.⁷ A plaintiff has the same time after notice of appearance in which to file his declaration as after service, unless the defendant applies for a special rule on him to file it at a particular time.⁸

Waiver of.—Either party to a suit has the right to have the account or copy of the instrument upon which his adversary relies filed with his pleadings. But this right may be waived; and the party entitled to its enforcement must not so act as to lead the other to suppose it has been waived until it would subject him to loss or inconvenience to have it enforced.⁹

¹ *Hawthorn v. Cooper*, 22 Ill. 225; *Love v. Fairfield*, 5 Gilm. 303.

² *Franey v. True*, 26 Ill. 185; *Roberts v. Thompson*, 28 Ill. 79.

³ *Lee v. Mendel*, 40 Ill. 359.

⁴ *Kimball v. Kent*, 2 Scam. 217; *McCamley v. Peek*, 15 Bradw. 37; *Waidner v. Pauley*, 141 Ill. 442.

⁵ *Wilkins v. English*, 60 Ill. App.

344; *Herring v. Quimby*, 31 Ill. 153; *Waidner v. Pauly*, 141 Ill. 442; but see *Howell v. Ins. Co.*, 62 Ill. 50.

⁶ *Beck v. I. B. Ass'n*, 60 Ill. App. 423; *Tuter v. Poe*, 48 Ill. App. 158.

⁷ *Kimball v. Kent*, 2 Scam. 217.

⁸ *Johnson v. Noble*, 37 Ill. App. 314.

⁹ *Howe v. Frazer*, 117 Ill. 191; *Fowler v. Meyers*, 59 Ill. App. 248.

With plea of set-off.—A plea of set-off being in the nature of a declaration in a cross-action, section 32 of the Practice Act, requiring the defendant to file with his plea a copy of the instrument or account upon which he relies, is governed substantially by the same rules and principles that are applied to section 18 of that act, requiring the plaintiff to file a copy of the instrument or account sued on.¹

Bill of particulars.—If the copy of the account filed is not sufficiently specific, the defendant, under the rules of practice, may apply to the court, who will grant a rule to file a sufficient bill of particulars.² The object of requiring the plaintiff to file a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrict the plaintiff, on the trial, to proof of the particular cause or causes of action therein mentioned. It is, however, subject to amendment as any other pleading.³ As a general rule the recovery will be confined to the amount specified in the bill of particulars.⁴ A bill of particulars can not be required in action *ex delicto*.⁵

¹ *Howe v. Frazer*, 117 Ill. 191.

² *McCarthy v. Mooney*, 41 Ill. 300;
Howe v. Frazer, 117 Ill. 191.

³ *Waidner v. Pauly*, 141 Ill. 442;
McDonald v. People, 126 Ill. 150.

⁴ *Hess v. Dawson*, 149 Ill. 138; *Morton v. McClure*, 22 Ill. 257.

⁵ *R. R. Co. v. Smith*, 10 Bradw. 359.

CHAPTER III.

DEFENSES TO AN ACTION.

- I. MOTIONS TO QUASH, OR TO DISMISS.
- II. PLEAS TO THE JURISDICTION AND IN ABATEMENT, REPLICATION THERE TO, ETC., WITH PRECEDENTS.
- III. PLEAS IN BAR, REPLICATIONS THERE TO, ETC., WITH PRECEDENTS.
- IV. DEMURRERS, WITH PRECEDENTS.

The defendant to an action may make his defense in various ways, according to the circumstances: he may *move to quash the writ, etc., or to dismiss the suit; or plead to the jurisdiction of the court, or in abatement of the action; or demur to the declaration; or plead in bar of the action.*

The observations here submitted, on the subject of defenses, are applicable to all the forms of action, and will be referred to under the proper heads.

I. MOTIONS TO QUASH, OR TO DISMISS.

How made.—If sufficient ground appears from the papers or record it is not always necessary (although preferable) that the motion be in writing—as, where a suit is brought on an office bond, etc., without filing security for costs; but when the motion to dismiss is on the ground of the plaintiff's being a non-resident, and not having filed security for costs, then such motion must be based on an affidavit showing the non-residence of the plaintiff. As a general rule, however, motions should be made, and the grounds thereof set forth, in writing.

When must be made.—All motions of a dilatory nature must be interposed at the first opportunity. If there is any delay in making such a motion, good reason for the delay

must be shown to the court.¹ A motion of this kind comes too late after a general appearance in the cause.²

As to what is a general appearance, it is held that where a defendant has made several successive motions in a cause, without in such motions limiting his appearance to the special purposes thereof, he has appeared generally;³ and it is said that if a defendant appears for a special purpose, such as to show that he is not properly in court, he ought to restrict his appearance accordingly in his motion, as otherwise he may be held to have appeared generally.⁴ An appearance is not withdrawn by the withdrawing of a plea by leave of the court.⁵ Where there was defective notice by publication to one of the defendants, a non-resident, but the record showed that the "defendants" had moved to quash the summons, it was held that there was such an appearance by the non-resident as cured the defect in the notice.⁶

When writ, etc., will be quashed, or suit dismissed, on motion.—If the writ is not under seal,⁷ or is returnable on any other day than the first day of the term, or the day fixed

¹ *Menard v. Marks*, 1 Scam. 26; *Edwards v. Helm*, 4 Scam. 143; *Bines v. Proctor*, 4 Scam. 174; *Robertson v. Com.*, 5 Gilm. 559; *Trustees v. Walters*, 12 Ill. 154; *Randolph v. Emerick*, 13 Ill. 344; *Moss v. Flint*, 13 Ill. 570; *Miller v. Metzger*, 16 Ill. 390; *Frazure v. Zimmerly*, 25 Ill. 202; *Gilmore v. Nowland*, 26 Ill. 200; *Archer v. Claflin*, 31 Ill. 306; *Roberts v. Fahs*, 32 Ill. 474; *Wayman v. Crozier*, 35 Ill. 156; *Clifford v. Town*, 35 Ill. 444; *Dunning v. Dunning*, 37 Ill. 306; *Yocum v. Town*, 39 Ill. 220; *Ruckinau v. Alwood*, 40 Ill. 128; *People v. Cloud*, 50 Ill. 439; *Courson v. Browning*, 78 Ill. 208; *Papineau v. Belgarde*, 81 Ill. 61; *Greer v. Young*, 120 Ill. 184.

² *Beecher v. James*, 2 Scam. 462; *R. R. Co. v. Keep*, 22 Ill. 9; *Abbott v. Semple*, 25 Ill. 107; *Dart v. Hercules*, 34 Ill. 395; *Miles v. Goodwin*,

35 Ill. 53; *Phelps v. Reeder*, 39 Ill. 172; *Price v. R. R. Co.*, 40 Ill. 44; *Roberts v. Formhalls*, 46 Ill. 66; *McBam v. People*, 50 Ill. 503; *Ins. Co. v. Broach*, 31 Ill. App. 502.

³ *Abbott v. Semple*, 25 Ill. 107; *Flake v. Carson*, 33 Ill. 518; *Miles v. Goodwin*, 35 Ill. 53; *Baldwin v. McClelland*, 152 Ill. 42.

⁴ *Miles v. Goodwin*, 35 Ill. 53; *Ogle v. Coffey*, 1 Scam. 238; *Schoonhoven v. Gott*, 20 Ill. 46; *McNab v. Bennett*, 66 Ill. 157.

⁵ *Dart v. Hercules*, 34 Ill. 395.

⁶ *Sullivan v. Sullivan*, 42 Ill. 315. See *Farber v. Iron Co.*, 50 Ill. App. 503.

⁷ *Ogle v. Coffey*, 1 Scam. 238; *Easton v. Altum*, 1 Scam. 250; *Anglin v. Nott*, 1 Scam. 395; *Garland v. Britton*, 12 Ill. 232; *Williams v. Vanmetre*, 19 Ill. 293.

by law,¹ or does not show with certainty in the court of what county the defendant is required to appear,² or varies materially from the declaration, etc.³ (but not, it seems, when the variance is in the name of the defendant),⁴ such writ will be quashed on motion.⁵ Where the defect does not appear upon the face of the writ, the same matters may be pleaded in abatement.⁶ A writ of *capias ad respondendum*, attachment or replevin may also be quashed on motion for insufficiency of the affidavit on which such writ is based, or defect in the writ itself; but in attachment the affidavit and writ,⁷ and in replevin (in the discretion of the court) the affidavit⁸ may in Illinois be amended. Also, in the case of an attachment (and probably now of a *capias*), the writ may be quashed, or suit dismissed, for want of the bond required by law,⁹ unless the plaintiff will furnish the requisite bond; and if the declaration is not filed on the return of the attachment, or at the term to which the same is returnable, the defendant may, in the discretion of the court, have the suit dismissed.¹⁰

II. PLEAS TO THE JURISDICTION, AND IN ABATEMENT.

Order of pleading.—"The law has prescribed and settled the order of pleading which the defendant is to pursue, viz.:

¹ Gould's Pl. 267; *Rattan v. Stone*, 2 Scam. 541; *Hildreth v. Hough*, 20 Ill. 331; *Elee v. Wait*, 28 Ill. 70.

² *Orendorff v. Stanberry*, 20 Ill. 89; *Gill v. Hobbit*, 23 Ill. 473.

³ *Schoonhoven v. Gott*, 20 Ill. 46; *Windett v. Hamilton*, 52 Ill. 180.

⁴ *Reaugh v. McConnell*, 36 Ill. 373; but see *Schoonhoven v. Gott*, 20 Ill. 46; 1 Chit. Pl. 391.

⁵ Gould's Pl. 267, 251; *Greer v. Young*, 120 Ill. 184.

⁶ *Greer v. Young*, 120 Ill. 184.

⁷ Rev. Stat. (1893), 173; Rev. Stat.

(1895), 177; 1 Starr & Curtis 322; *Russell v. Martin*, 2 Scam. 492.

⁸ *Frink v. Flanagan*, 1 Gilm. 35; *Campbell v. Head*, 13 Ill. 122; *McCloughrey v. Cratzenberg*, 39 Ill. 117.

⁹ Rev. Stat. (1893), 169; 1 Starr & Curtis 311; Rev. Stat. (1895), 173; *Lawrence v. Yeatman*, 2 Scam. 15; *Singleton v. Wafford*, 3 Scam. 577; *Love v. Fairfield*, 5 Gilm. 303.

¹⁰ Rev. Stat. (1893), 172; Rev. Stat. (1895) 176; 1 Starr & Curtis, 320; *Stoddard v. Miller*, 29 Ill. 291.

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| { | 1st. | To the jurisdiction of the court. | |
| | 2dly. | To the disability, etc., of the person : | |
| | | 1st. | Of the plaintiff; |
| | | 2dly. | Of the defendant. |
| | 3dly. | To the count, or declaration. | |
| { | 4thly. | To the writ : | |
| | | 1st. | To the form of the writ.: |
| | | 1st. | Matter apparent on the face of it. |
| | | 2dly. | Matter dehors; |
| | | 2dly. | To the action of the writ. |
| | 5thly. | To the action itself, in bar thereof. | |

This, it is said, is the natural order of pleading, because each subsequent plea admits that there is no foundation for the former—as when the defendant pleads to the person of the plaintiff, he admits the jurisdiction of the court,” etc. “If this order of pleading be inverted, the defendant will be precluded from pleading any matter prior in point of order.”¹

Pleas in abatement.—A plea in abatement is defined to be a plea that, without disputing the justness of the plaintiff's claim, objects to the place, mode or term of asserting it, and requires that therefore, and *pro hac vivi*, judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time.² The office of a plea in abatement is to set up matter which merely defeats the present proceeding but does not show that the plaintiff is forever concluded, and it must give the plaintiff a better writ.³ All *dilatory* pleas are sometimes called pleas in *abatement*, as contradistinguished from pleas to actions or in bar. This, however, is never proper when strict accuracy is required.⁴

Requisites of pleas in abatement.—Pleas of this character are required to be full, certain and formal in every particular. Not being favored by courts, because of their dilatory nature, they are not aided by any intendment,⁵ and can not

¹ 1 Chit. Pl. 379.

² 1 Chit. Pl. 441; Comyn's Digest, 1, 11; *Pitts Mfg. Co. v. Com. Nat. Bank*, 121 Ill. 582.

³ 1 Chit. Pl. 446 *et seq.*; *Gregg v. Summer*, 21 Ill. App. 110.

⁴ Gould's Pl., Sec. 35.

⁵ Tidd's Pr. 639; 1 Chit. Pl. 395; Gould's Pl. 75, 76; *Holloway v. Freeman*, 22 Ill. 197; *Fowler v. Arnold*, 25 Ill. 284; *Diblee v. Davison*, 25 Ill. 486; *Parsons v. Case*, 45 Ill. 296; *Nixon v. Ins. Co.*, 47 Ill. 444; *Buckles v. Harlan*, 54 Ill. 361; *Humphrey v.*

be altered or amended.¹ Whether a plea is in abatement or in bar is to be determined, not from the subject-matter of the plea, but from its conclusion. The relief sought by the prayer of the plea determines its character.²

At what time dilatory pleas must be pleaded.—All pleas in abatement (under which general name are here included pleas to the jurisdiction and all other dilatory pleas), and objections of that nature, must be interposed at the first opportunity, in any court, whether a court of record or not.³ It is too late to plead in abatement after demurring to the declaration,⁴ or pleading in bar of the action,⁵ or joining in error;⁶ or to plead to the jurisdiction after a motion seeking the same object of the plea,⁷ or after the defendant has appeared, and moved for a continuance.⁸ Nor can a plea in abatement be pleaded after a similar plea has been stricken from the files.⁹ But it must be understood that the defendant is not bound to plead at all until the plaintiff is in a situation to compel him to plead.¹⁰

Phillips, 57 Ill. 132; *Feasler v. Schriever*, 68 Ill. 322; *U. N. Bank v. F. N. Bank*, 90 Ill. 56; *Ryan v. Lander*, 89 Ill. 554; *Hill v. Harding*, 93 Ill. 77; *Garrick v. Chamberlain*, 97 Ill. 620; *Pitts v. Bank*, 121 Ill. 586.

¹ 1 Chit. Pl. 405; Gould's Pl. 236; *Holloway v. Freeman*, 22 Ill. 197; *Cook v. Yarwood*, 41 Ill. 115; *Drake v. Drake*, 83 Ill. 526; *Pitts Mfg. Co. v. Com. Nat. Bank*, 121 Ill. 582.

² 1 Tidd's Pr. 637; *Jenkins v. Pepperon*, 2 Johns. Cas. 312; *Pitts Mfg. Co. v. Com. Nat. Bank*, 121 Ill. 582.

³ *Conley v. Good*, Breese 135; *Pearce v. Swan*, 1 Scam. 266; *Greer v. Wheeler*, 1 Scam. 554; *Bines v. Proctor*, 4 Scam. 174; *Duncan v. Charles*, 4 Scam. 561; *Wilson v. Nettleton*, 12 Ill. 61; *Randolph v. Emerick*, 13 Ill. 344; *Moss v. Flint*, 13 Ill. 570; *Thorpe v. Starr*, 17 Ill. 199; *Stumps v. Kelly*, 22 Ill. 140; *Holloway v. Freeman*, 22 Ill. 197; *Gilmore v. Nowland*, 26 Ill. 200; *Roberts v. Fahs*,

32 Ill. 474; *Wayman v. Crozier*, 35 Ill. 156; *Clifford v. Eagle*, 35 Ill. 444; *Messeroy v. Beckwith*, 41 Ill. 452; *Archibald v. Argall*, 53 Ill. 307; *R. R. Co. v. Williams*, 77 Ill. 354; *Fondville v. Monroe*, 74 Ill. 126; *U. N. Bank v. Nat. Bank*, 90 Ill. 56; *Fisher v. Cook*, 125 Ill. 280.

⁴ *Randolph v. Emerick*, 13 Ill. 344; *Ferguson v. Rawlings*, 23 Ill. 69.

⁵ *Walker v. Welch*, 14 Ill. 277; *Gilmore v. Nowland*, 26 Ill. 200; *Allen v. Watt*, 69 Ill. 655; *Lindsay v. Stout*, 59 Ill. 491; *Fisher v. Cook*, 125 Ill. 280; *Dodge v. People*, 113 Ill. 495.

⁶ *Robinson v. Magarity*, 28 Ill. 423; *Oliver v. Cochran*, 19 Bradw. 236.

⁷ *Archer v. Claflin*, 31 Ill. 306.

⁸ *Roberts v. Thompson*, 28 Ill. 79; *U. N. Bank v. Nat. Bank*, 90 Ill. 56.

⁹ *Cook v. Yarwood*, 41 Ill. 115; 1 Starr & Curtis, 182; Rev. Stat. (1893), 102; Rev. Stat. (1895), 102.

¹⁰ *Shepard v. Ogden*, 2 Scam. 257; *Archer v. Claflin*, 31 Ill. 306.

Statutory, etc., relating to pleas in abatement.—Section 4 of the statute in relation to abatement, declares that “when a defendant in an action upon a contract, express or implied, pleads in abatement the non-joinder of any other person as defendant, the court shall, at any time before issue joined on such plea, allow the plaintiff to amend his declaration, by inserting therein the name of the person named in such plea, and declaring against him jointly with the original defendant.”¹

Premature action.—A defense that a suit was begun before the claim was due, should be set up by plea in abatement, and not by plea in bar.² Thus, if an action is brought in violation of contract to extend time of payment, it has been held, that is a defense in abatement only, and can not be set up after pleading in bar.³

Variance.—A variance between a summons and the declaration may be taken advantage of by a plea in abatement;⁴ and can only be taken advantage of by such plea, or by motion to quash.⁵

Amendments to cure matters of abatement.—By section 3 of the abatement act, it is provided that “No action or proceeding shall be defeated by plea in abatement, if the defect found is capable of amendment, and is amended on terms prescribed by the court.”⁶

A variance between summons and declaration,⁷ misjoinder, non-joinder and misnomer can be cured by amendment. “No action, proceeding or complaint, in law or equity, commenced by or against a *feme sole*, either alone or with others, shall abate on account of her intermarriage before final judgment,

¹ 1 Starr & Curtis 181; Rev. Stat. (1893), 101; Rev. Stat. (1895), 101; *Damron v. Sweetser*, 16 Bradw. 339.

² *Palmer v. Gardiner*, 77 Ill. 143; contra, *McCoy v. Babcock*, 1 Bradw. 414; *Life Ass'n v. Hagler*, 23 Ill. App. 457.

³ *Culver v. Johnson*, 90 Ill. 91; *Archibald v. Argall*, 53 Ill. 307; *Pitts v. Com. Nat. Bk.*, 21 Ill. App. 483.

⁴ *Simons v. Waldron*, 70 Ill. 281; *Fonville v. Monroe*, 74 Ill. 126; 1

Chit. Pl. 389; Gould Pl. 235; *Allen v. Watt*, 69 Ill. 655.

⁵ *Prince v. Lamb*, Breese 378; *Rust v. Fort*, Breese 331; *Weld v. Hubbard*, 11 Ill. 573; *Thorp v. Starr*, 17 Ill. 199; *Carpenter v. Hoyt*, 17 Ill. 529; *Schoonhoven v. Gott*, 20 Ill. 46; *Windett v. Hamilton*, 52 Ill. 180.

⁶ 1 Starr & Curtis' 181; Rev. Stat. (1893), 101; Rev. Stat. (1895), 101.

⁷ *Wilday v. Wright*, 71 Ill. 374; *Heslip v. Peters*, 3 Scam. 45.

but she may continue to prosecute or defend the same in like manner as if she were sole."¹ The statute provides that "a married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried."²

Death of sole plaintiff or defendant.—By the common law, the death of a sole plaintiff or sole defendant, *pendente lite*, abates the suit; and if one of several plaintiffs die pending the suit, it will in most cases abate; but if one of several defendants die, it is generally no cause of abatement, but the plaintiff may suggest the death upon the record, and proceed in the same suit against the survivors, if the cause of action is such as would survive against them, as is almost universally the case.³ But by statute, however, in England, and generally in the states of the union, the common law has been modified in respect to the abatement of suits by the death of parties, and provision has been made for the substitution of the representatives of such deceased parties, and in all cases where the cause of action survives.

Death of sole plaintiff.—By section 10 of the abatement act, it is provided that "where there is but one plaintiff, petitioner or complainant in an action, proceeding or complaint, in law or equity, and he shall die before final judgment or decree, such action, proceeding or complaint shall not on that account abate, if the cause of action survive to the heir, devisee, executor or administrator of such decedent, but any of such to whom the cause of action shall survive, may by suggesting such death upon the record, be substituted as plaintiff, petitioner or complainant, and prosecute the same as in other cases."⁴ The suggestion of death, made without ob-

¹ 1 Starr & Curtis, 182; Rev. Stat. (1893), 102; Rev. Stat. (1895), 102.

² Rev. Stat. (1895), 855; Rev. Stat. (1893), 806; 1 Starr & Curtis, 1269; *Wing v. Goodman*, 75 Ill. 159; *Anderson v. Friend*, 71 Ill. 475; *Martin v. Robson*, 65 Ill. 129; *Chicago v. Speer*, 66 Ill. 154; *Hennie v. Vogel*, 66 Ill. 401; *R. R. Co. v. Dickson*, 67

Ill. 122; *R. R. Co. v. Button*, 68 Ill. 409; *Bassett v. Bassett*, 20 Bradw. 543; *Bloomington v. Annett*, 16 Bradw. 199.

³ Gould's Pl. 246, 248.

⁴ 1 Starr & Curtis, 182; Rev. Stat. (1893), 102; Rev. Stat. (1895), 102. See *Bunker v. Green*, 48 Ill. 243; *Murphy v. McGrath*, 79 Ill. 594;

jection from the adverse party, and an order allowing substitution of names, is *prima facie* proof, for the purposes of the case, of the death of the original plaintiff.¹

An order substituting administrator of sole plaintiff is necessary.² But entering judgment in favor of a dead person, without first reviving suit in the name of his representatives, is not such an error as requires a reversal of a judgment.³ When the representatives of a deceased party are substituted in his stead, the declaration need not be amended by the insertion of their names.⁴

Death of sole defendant.—Section 11 of the statute in relation to abatement, provides that “when there is but one defendant in an action, proceeding or complaint, in law or equity, and he dies before final judgment or decree, such action, proceeding or complaint shall not on that account abate, if it might be originally prosecuted against the heir, devisee, executor or administrator of such defendant; but the plaintiff, petitioner or complainant may suggest such death on the record, and shall, by order of the court, have summons against such person or legal representative, requiring him to appear and defend the action, proceeding or complaint, after which it may proceed as if it had been originally commenced against him.”⁵

The representatives of a deceased defendant will not be allowed to suggest the defendant's death, unless he submits himself to the jurisdiction of the court.⁶ Section 11 applies to appeals and writs of error,⁷ and to attachment suits.⁸

Several parties—Death of part.—Where there are several plaintiffs or defendants, and any of them die before final judg-

Katz v. Moessinger, 110 Ill. 372; *Coal v. Long*, 91 Ill. 617; *Leamon v. McCubbin*, 82 Ill. 263.

¹ *Stebbens v. Duncan*, 108 U. S. 32.

² *Thorp v. Starr*, 17 Ill. 199; *Milliken v. Marlin*, 66 Ill. 13.

³ *Bunker v. Green*, 48 Ill. 243; *Murphy v. McGrath*, 79 Ill. 594.

⁴ *Hos v. Van Alstyne*, 20 Ill. 202.

⁵ 1 Starr & Curtis, 183; Rev. Stat. (1893), 102; Rev. Stat. (1895), 102; *Sharpe v. Morgan*, 144 Ill. 382; *Dow v. Blake*, 148 Ill. 76.

⁶ *Life Ins. v. Fassett*, 102 Ill. 315. See *Danforth v. Danforth*, 111 Ill. 236.

⁷ *Diversey v. Smith*, 9 Bradw. 437.

⁸ *Davis v. Shapleigh*, 19 Ill. 386.

ment, the action shall not abate, but the death may be suggested and the cause proceed as to the survivors.¹ It would not be proper to join administrator of deceased defendant with a surviving defendant,² nor the administrator of a deceased plaintiff with the surviving partner.³

Death of all on one side.—In case all the plaintiffs or all the defendants die, the cause may be prosecuted or defended by or against the heir, devisee or administrator, to or against whom the cause survives, etc.⁴

Pleas in abatement—When to be verified.—The first section of the abatement act provides: "That no plea in abatement, other than a plea to the jurisdiction of the court, or when the matters relied upon to establish the truth thereof appear of record, shall be admitted unless the same is verified by the affidavit of the person offering the same, or of some other person for him."⁵ Every pleading which sets up matter in abatement which does not appear of record to be true, must be verified by affidavit; and if not so verified should be stricken from the files on motion.⁶ Where a summons has been issued, but not delivered to the sheriff to serve, the suit does not thereby abate.⁷

Judgment upon a plea in abatement.—In ordinary actions at law, in courts of record, the judgment on the finding of the issues for the plaintiff, upon a plea in abatement, is interlocutory or final, according to the nature of the action. If the action be for damages in assumpsit or in tort, it is interlocutory; but if it be in debt for a sum certain, or for a specific recovery of land or goods, it is final.⁸ If the judgment is for the plaintiff

¹ 1 Starr & Curtis, 183; Rev. Stat. (1893), 102; Rev. Stat. (1895), 102; *Steele v. Thatcher*, 79 Ill. 400.

² *Eich v. Sievers*, 73 Ill. 194; see *Richeson v. Ryan*, 15 Ill. 13; *Stoetzell v. Fullerton*, 44 Ill. 108.

³ *Betton v. Fish*, 44 Ill. 32.

⁴ 1 Starr & Curtis, 184; Rev. Stat. (1893), 102; Rev. Stat. (1895), 102.

⁵ 1 Starr & Curtis, 177; Rev. Stat. (1893) 101; Rev. Stat. (1895) 101.

⁶ *Life Ass'n v. Fassett*, 102 Ill. 315; *Ryan v. Lander*, 89 Ill. 554; *King v. Haines*, 23 Ill. 340; *Cook v. Varwood*, 41 Ill. 115; *McNab v. Bennett*, 66 Ill. 157; *Mount v. Scholes*, 120 Ill. 394; *Ricker v. Schofield*, 28 Ill. App. 32.

⁷ *Schroeder v. Ins. Co.*, 104 Ill. 71.

⁸ *Steele v. Ry. Co.*, 20 Bradw. 366;

2 Tidd's Pr. 740; Gould's Pl. (4th Ed.) Chap. 5, Sec. 159.

iff on demurrer to the plea, the judgment is only interlocutory, *quod respondeat* ouster.¹

The judgment for the defendant on a plea in abatement, whether on an issue of fact or in law, is that the writ be quashed;² or if a temporary disability or privilege is pleaded, that the *plaint* remained without day, until, etc.³

Plea in abatement by corporation.—A plea by a corporation aggregate, which is incapable of personal appearance, must purport to be by attorney.⁴ A corporation may put in issue the fact of the service of process upon it by plea in abatement, and then contradict the officer's return, which is only *prima facie* evidence of the truth of the facts therein recited.⁵ In the case of *The Protection Life Insurance Co. v. Palmer*, 81 Ill. 88, it was held that the question whether a summons has been properly served can not be raised by a plea in abatement; but can only be properly considered on motion to quash the service and return. The same rule was adopted in *Greer v. Youngs*, 120 Ill. 184; but the supreme court in *Union National Bank v. First National Bank*, 90 Ill. 56, pronounce the rule laid down in *The Protection Life Ins. Co. v. Palmer*, as *obiter dicta* merely; and that there was no design in that case to overrule the previous decisions.

No. 1. Plea to the jurisdiction.

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } *Assumpsit*.

A. B. } And the said C. D., in his own person, comes and defends, etc., and says, that before and at the time of the commencement of the said action of the said A. B., he, the said C. D., was, and from thence hitherto has been, and still is, residing in the county of ———, in the said State of Illinois,

¹ 1 Chit. Pl. 405; Gould's Pl. 277; *Delahay v. Clement*, 3 Scam. 201; *Bradshaw v. Moorehouse*, 1 Gilm. 395; *Weld v. Hubbard*, 11 Ill. 573; *Atkinson v. Bank*, 5 Blackf. 85; *Haight v. Holley*, 3 Wend. 263.

² Gould's Pl. 277; *McKinstry v. Pennoyer*, 1 Scam. 319; *Motherell v. Beaver*, 2 Gilm. 69; *Eddy v. Brady*,

16 Ill. 306; *Cushman v. Savage*, 20 Ill. 330; *Spaulding v. Lowe*, 58 Ill. 96.

³ 1 Chitty's Pl. 405.

⁴ Chitty's Pl., Vol. 1, p. 551; *Nixon v. Ins. Co.*, 47 Ill. 444; *Nispel v. R. Co.*, 64 Ill. 311; *Kankakee Drain. Dist. v. Comm.*, 29 Ill. App. 86.

⁵ *Bank v. Bank*, 90 Ill. 56.

and not in the said county of —; and that he, the said C. D., was not found or served with process in the said action in the said county of —, but was found and served with process in the said action in the said county of —; and this he is ready to verify; wherefore he prays judgment if the court here will take cognizance of the action aforesaid.

C. D.

E. F., Counsel.

The second section of the Illinois Practice Act of 1872 provides that "it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions, in law, where there is more than one defendant, the plaintiff commencing his action where either of them resides may have his writ or writs issued, directed to any county or counties where the other defendants, or either of them, may be found: *Provided*, that if a verdict shall not be found, or judgment rendered, against the defendant or defendants resident in the county where the action is commenced, judgment shall not be rendered against those defendants who do not reside in the county, unless they appear and defend the action."¹

Unless a defendant, when sued in a foreign county, insists upon his privilege in apt time, by a plea to the jurisdiction, it will be presumed that he has waived his right to be sued in his own county.² The matter is not pleadable in bar,³ nor can advantage be taken thereof by a motion to dismiss,⁴ or on demurrer, or writ of error.⁵

Superior courts of general jurisdiction (and such are the circuit courts in Illinois),⁶ are presumed to be in the proper exercise thereof, until the contrary is shown; and pleas to their jurisdiction must set forth facts showing a want of jurisdiction, and must be certain in every particular.⁷

¹ Rev. Stat. (1893), 1071; Starr & Curtis, 1773; Rev. Stat. (1895), 1155; *Funk v. Ironmonger*, 76 Ill. 506; *R. Co. v. Williams*, 77 Ill. 354.

² *Holloway v. Freeman*, 22 Ill. 197; *Allen v. Watt*, 69 Ill. 655; *Stark v. Ratcliff*, 111 Ill. 75.

³ *Waterman v. Tuttle*, 18 Ill. 292.

⁴ *Holloway v. Freeman*, 22 Ill. 197;

Ins. Co. v. Buckles, 49 Ill. 482; see *Safford v. Ins. Co.*, 88 Ill. 296; *McCulloch v. Ellis*, 28 Ill. App. 439.

⁵ *Hardy v. Adams*, 48 Ill. 532.

⁶ *Kenney v. Greer*, 13 Ill. 432.

⁷ *Kenney v. Greer*, 13 Ill. 432; *Dibblee v. Davison*, 25 Ill. 486; *Aird v. Haynie*, 36 Ill. 174; *Ins. Co. v. Buckles*, 49 Ill. 482.

A plea showing that a defendant has been sued out of his county, on process sent to his county, is not strictly a plea in abatement, but a meritorious one to secure a substantial right, and if defective in form, is amendable.¹ Pleas to the jurisdiction must be pleaded in person, and not by attorney,² except when pleaded by a corporation.³

In a case where one of two defendants signed a plea of this kind by the initials of his given name, it was held insufficient;⁴ though it would not seem to be necessary that the defendant should *sign* the plea at all, but merely that it should appear to be *pleaded* in person. In Illinois, as we have seen, these pleas are not required to be verified by affidavit.⁵ They should conclude by praying judgment "if the court will take cognizance," etc., and not "that the writ be quashed."⁶

It is not necessary, it would seem, in Illinois, to point out in the plea some other court in which the defendant ought to be sued, since the courts must take judicial notice of the law, which establishes certain tribunals in every county. See further, as to pleas to the jurisdiction, especially of inferior courts, 1 Chit. Pl. 383-386, and Gould's Pl. 216-223.

No. 2. *Plea of misnomer of defendant, in christian name.*

In the ——— Court.

— Term, 18—.

C. D., sued by the name of E. D.,
ats.
A. B. }

{ *Assumpsit.*

A. B.

And C. D. (against whom the said

A. D. has sued out his said writ by the name of E. D., in his own person comes and says, that he is named and called C. D., and by that name and that surname has always hitherto been named and called; without this that he, the said C. D., now is, or ever was, named or called by the name of E., as by the said writ is supposed. And this he, the said C. D., is ready to verify; wherefore he prays judgment of the said writ, and that the same may be quashed, etc.

C. D.

G. H., Counsel.

¹*Safford v. Ins. Co.*, 88 Ill. 296;
Drake v. Drake, 83 Ill. 526.

⁵1 Starr & Curtis 177; Rev. Stat. (1893), 101; Rev. Stat. (1895), 101.

² 1 Chit. Pl. 380; Gould's Pl. 222;
R. R. Co. v. Keep, 22 Ill. 9.

⁶ 1 Chit. Pl. 380; Gould's Pl. 222.

³ *Nispel v. R. R. Co.*, 64 Ill. 311;
Kankakee v. Comm., 29 Ill. App. 86.

Drake v. Drake, 83 Ill. 526; see *Wul-*
lace v. Cox, 71 Ill. 548; *Safford v.*
Ins. Co., 88 Ill. 296.

⁴ *Holloway v. Freeman*, 22 Ill. 197.

In the ——— Court.

C. D., sued by the name of E. D.,	} <i>Assumpsit.</i>
<i>ats.</i> A. B.	

makes oath and says, that the plea hereunto annexed is true in substance and fact.

C. D.

Subscribed and sworn, etc.

The affidavit must be positive;¹ it is not sufficient to say “to the best of the knowledge and belief” of the affiant.² It is said that the affidavit must be entitled in the cause; but in Illinois it is held that this is unnecessary where the affidavit is written on the same piece of paper with the plea, and refers to it,³ as is usually the case.

The above form of plea can be readily adapted to the case of a misnomer of the defendant as to his surname. For a plea of misnomer of the plaintiff, see 3 Chit. Pl. 903.

It appears advisable, it is said, to plead misnomer of the defendant in person, and that coverture of the defendant should not be pleaded by attorney;⁴ but it is presumed that all pleas, except those to the jurisdiction, may be pleaded by attorney.

Misnomer in describing one of two defendants can not be pleaded by the other.⁵ If the right name was used in the writ, but the defendant is miscalled in the declaration, it seems the latter may be amended.⁶ A defendant sued by his given name alone must plead the misnomer in abatement; and if it is not so pleaded the objection is waived.⁷

A county which has adopted township organization can, in Illinois, only be sued by the name of the board of supervisors, and, if sued otherwise, it is not necessary to plead the matter in abatement. The capacity of a county to be sued is only given by special statute, and the statute must be followed.⁸

¹ 1 Chit. Pl. 402.

² *King v. Haines*, 23 Ill. 340.

³ *Cook v. Yarwood*, 41 Ill. 115.

⁴ 3 Chit. Pl. 899*n*, 901*o*.

⁵ 1 Chit. Pl. 391; *Gould's Pl.* 240.

⁶ *Schoonhoven v. Gott*, 20 Ill. 46.

⁷ *Hammond v. People*, 32 Ill. 446;
Pond v. Ennis, 69 Ill. 341; *Scott v.*

White, 71 Ill. 287; *Goodkind v. Bartlett*, 153 Ill. 419; *Penn Co. v. Sloan*, 125 Ill. 72; see *Feasler v. Schriever*, 68 Ill. 322.

⁸ *Rock Island v. Steele*, 31 Ill. 543;
Schuyler Co. v. Mercer Co., 4 Gilm. 20.

But generally a corporation defendant can not take advantage of a misnomer except by plea in abatement;¹ and misnomer of a corporation plaintiff is also to be pleaded in abatement.² If the misstatement of a name, in suing on a written contract, causes a variance, advantage may be taken of it under the general issue.³ A defendant can not plead in abatement because of an *alias dictus* added to his name.⁴ An initial letter between the christian name and surname is no part of the name, and the omission of it does not cause a misnomer or variance.⁵

If the name by which a party sues or is sued is the same in sound with his true name, there is no misnomer. In the following instances it was held that the rule of *idem sonans* applied: *Sinclair*, for *St. Clair*; ⁶ *Samuel Headley*, for *Samuel Headly, Jr.*; ⁷ *Little*, for *Lytle*; ⁸ *McDonald*, for *McDonnell* ⁹ and *Burnstein*, for *Barnstein*.¹⁰ But *Schoonover* and *Schoonhoven* are not the same; ¹¹ and it will not be presumed, without averment, that *Bart* is an abbreviation of *Bartholomew*.¹²

Where the name appears to be a foreign one, and there is simply a variance of a letter which, according to the pronunciation of the language to which the name belongs, does not vary the sound, it is not a misnomer—as *Petris*, for *Petrie*.¹³ Respecting foreign names, it is said that courts should be slow to pronounce that a variance, unless obviously so, which may be only a misspelling or mispronunciation of the name.¹⁴

The plaintiff may traverse the plea of misnomer, or reply

¹ *Gilbert v. Bank*, 5 Mass. 97.

² 1 Chit. Pl. 391; *Hoereth v. Mill Co.*, 30 Ill. 151; *R. R. Co. v. Heinrich*, 57 Ill. App. 299.

³ 4 Term R., 611; Chit. on Bills, 6th Ed., 353; 1 Chit. Pl., 391.

⁴ *Reid v. Lord*, 4 Johns. 118.

⁵ *Thompson v. Lee*, 21 Ill. 242; *Miller v. People*, 39 Ill. 457; *Bletch v. Johnson*, 40 Ill. 116; *Tucker v. People*, 122 Ill. 588; *Langdon v. People*, 133 Ill. 395.

⁶ *Rivard v. Gardner*, 39 Ill. 125.

⁷ *Headley v. Shaw*, 39 Ill. 354.

⁸ *Lytle v. People*, 47 Ill. 422.

⁹ *McDonald v. People*, 47 Ill. 533.

¹⁰ *Springer v. Hutchinson*, 59 Ill. App. 80.

¹¹ *Schoonhoven v. Gott*, 20 Ill. 46; see also *Gonzalia v. Bartelsman*, 143 Ill. 634; *Guertin v. Mombieu*, 144 Ill. 32.

¹² *Curtiss v. Marrs*, 29 Ill. 508.

¹³ *Petrie v. Woodworth*, 3 Caine 219.

¹⁴ *Chiniquy v. Cath. Bishop*, 41 Ill. 148.

an estoppel,¹ or that the defendant is known as well by the one name as the other.² It seems that where a misnomer was truly pleaded, the plaintiff might amend his declaration at common law and the suit might proceed.³

Where the real party in interest, and the one intended to be sued, is actually served with process in the cause, even though under a wrong name, he must take advantage of the misnomer by plea in abatement in such suit. If he does not, he will be concluded or decree rendered the same as if sued in his true name.⁴

No. 3. Replication to No. 2. Defendant known as well by one name as the other.

In the ——— Court.

—— Term, 18—.

A. B. }
vs. } *Assumpsit.*
E. D. } And the plaintiff says, that the said writ, by reason of anything by the defendant in his plea above alleged, ought not to be quashed, (*) because he says that the defendant, long before and at the time of the issuing of the said writ, was, and still is, called and known as well by the name of E. D. as by the name of C. D.: And this the plaintiff prays may be inquired of by the country, etc.

G. H., Attorney for Plaintiff.

In a case where the plaintiff sued as S. S. Farrington, and the defendant pleaded that the plaintiff's name was Samuel S. Farrington, a replication that he was known as well, etc., was held good.⁵

No. 4. Plea of non-joinder of party as defendant.

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } *Assumpsit.*
A. B. } And the said C. D., by E. F., his attorney, comes and defends, etc., and prays judgment of the said writ, because he says that the several supposed promises in the said declaration mentioned, if any such were made, were, and each of them was, made (*) jointly with one E. F., who is still living, and not by the said C. D. alone: And this he, the said C. D.,

¹ 3 Chit. Pl. 1143.

² 1 Chit. Pl. 402.

³ 3 Chit. Pl. 1142; Gould's Pl. 242;
Schoonhoven v. Gott, 20 Ill. 46;

⁴ *Pennsylvania Co. v. Sloan*, 125 Ill. 72.

Lucas v. Farrington, 21 Ill. 31.

⁵ *Lucas v. Farrington*, 21 Ill. 31.

is ready to verify; wherefore, inasmuch as the said E. F. is not named in the said writ together with the said C. D., he, the said C. D., prays judgment of the said writ, and that the same may be quashed, etc.

E. F., Attorney for Defendant.

(Add affidavit, as ante, No. 2.)

In *debt* on simple contract the form may be, "that the several supposed causes of action in the said declaration mentioned, if any such accrued, and each of them, and every part thereof, accrued against the said C. D. jointly with one E. F., who is still living, and not against the said C. D. alone," etc.

In *debt* on *bond*, the plea in abatement of non-joinder craves oyer of the bond, and avers that the party omitted sealed and delivered the deed, and that he is still living.¹

No. 5. *Replication to No. 4, denying that promises were made jointly, etc.*

(As in No. 3, ante, to the asterisk:) because he says, that the said several promises were not made by the defendant jointly with the said E. F., in manner and form as the defendant has above in his said plea alleged: And thus the plaintiff prays may be inquired of by the country, etc.

J. M., Attorney for Plaintiff.

The plaintiff may deny the plea, as above, or he may reply that the person not joined as defendant was dead at the time of the commencement of the suit,² or was an infant, or a married woman;³ or if there is in fact a debt due to the plaintiff from the defendant and a third person jointly, a new assignment seems proper, and sometimes necessary.⁴

"When a defendant in an action upon a contract, express or implied, pleads in abatement the non-joinder of any other person as defendant, the court shall at any time before issue joined on such plea, allow the plaintiff to amend his declaration by inserting therein the name of the person named in such plea, and declaring against him jointly with the original defendant."⁵

¹ 3 Chit. Pl. 901.

⁴ 2 Swan's Pr. 650a.

² *Cummings v. People*, 50 Ill. 132;
Dement v. Rokker, 126 Ill. 174.

⁵ Rev. Stat. (1893), 101; see *Smith v. Harris*, 12 Ill. 462.

³ 1 Chit. Pl. 35.

No. 6. *Plea of non-joinder of party as plaintiff.*

(As in No. 4, ante, to the asterisk:) to the said A. B. and one E. F., (who is still living,) jointly, and not to the said A. B. alone: And this he, the said C. D., is ready to verify; wherefore, inasmuch as the said E. F. is not named in the said writ together with the said A. B., he, the said C. D., prays judgment of the said writ, and that the same may be quashed, etc.

G. H., Attorney for Defendant.

(Add affidavit, as ante, No. 2.)

The plea in abatement of non-joinder must aver that the party omitted is still living;¹ and if the defendant pleads in abatement the non-joinder of a party, and it turns out that there are other joint contractors not named in the plea, the defendant will not succeed thereon.²

The non-joinder of a party who ought to be made *co-plaintiff*, in actions on contracts, will in general be ground of nonsuit and need not, though it may, be pleaded in abatement;³ but in the case of executors and others suing in right of representation, the omission can only be pleaded in abatement.⁴ If it appears from the plaintiff's own pleadings that there are other persons who ought to be, but are not, made plaintiffs, (or, in an action on a specialty, if this is made to appear, by craving oyer,) the defendant may avail himself of the omission on demurrer, or motion in arrest, or on error.⁵ In actions *ex delicto*, however, the non-joinder of a person as plaintiff must be pleaded in abatement; otherwise no advantage can be taken of it except in mitigation of damages.⁶ But in Illinois, in debt, on the statute, for cutting trees, etc., all the owners of the land must join, and the defendant is not required to plead a non-joinder of them in abatement.⁷

With regard to *defendants*, the omission of a joint contractor must be pleaded in abatement.⁸ If, however, it expressly ap-

¹ 1 Chit. Pl. 392.

² 1 Chit. Pl. 33.

³ 1 Chit. Pl. 8-392.

⁴ 1 Chit. Pl. 392-393; Gould's Pl. 257.

⁵ 1 Chit. Pl. 7, 8; Gould's Pl. 257; *Damron v. Sweetser*, 16 Ill. App. 339; *Dement v. Rokker*, 126 Ill. 174.

⁶ Gould's Pl. 257-258; 1 Chit. Pl. 393; *Edwards v. Hill*, 11 Ill. 22; *Johnson v. Richardson*, 17 Ill. 302.

⁷ *Edwards v. Hill*, 11 Ill. 22.

⁸ Chit. Pl. 32, 393; Gould's Pl. 255; *Lurton v. Gilliam*, 1 Scam. 577; *Thompson v. Strain*, 16 Ill. 369; *Page v. Brant*, 18 Ill. 37; *Cummings*

pears on the face of some pleading on the part of the plaintiff that the person omitted is still living, as well as that he jointly contracted, the defendant may demur, or move in arrest, or sustain a writ of error.¹ If there be a legal excuse for not joining a partner, as, if he be dead, the plaintiff must allege it.² In actions for *torts*, no advantage can in general be taken of a non-joinder of persons as *defendants*.³

No. 7. *Misjoinder of defendant—Plea by one defendant.*

In the ——— Court.

——— Term, 18—.

C. D. and E. F.	}	<i>Assumpsit.</i>
<i>ats.</i>		
A. B.		And the said E. F., by G. H., his attorney, comes and defends, etc., and prays judgment of the said writ, because he says that the several supposed promises in the said declaration mentioned, if any such were made, were, and each of them was, made by the said C. D. alone, and not by the said E. F. jointly with the said C. D.: And this he, the said E. F., is ready to verify; wherefore he prays judgment of the said writ, and that the same may be quashed, etc.

G. H., Attorney for E. F.

(Add affidavit, as ante, No. 2.)

As to a *misjoinder* of plaintiffs or defendants, in actions on contracts, at common law advantage may be taken of the mistake as well under the general issue as by plea in abatement;⁴ and this is the law in Illinois, as regards *plaintiffs*.⁵ In respect to *defendants*, the statute now in force in Illinois provides, that “in actions upon contracts, express or implied, against two or more defendants, as partners or joint obligors or payors, *whether so alleged or not*, proof of the joint liability or partnership of the defendants, or their christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment,

v. People, 50 Ill. 132; *Pearce v. Pearce*, 67 Ill. 207; *Ross v. Allen*, 67 Ill. 317; *Dement v. Rokker*, 126 Ill. 189.

¹ Chit. Pl. 32; *Thompson v. Strain*, 16 Ill. 369; see Gould's Pl. 260; *Dement v. Rokker*, 126 Ill. 189.

² 1 Chit. Pl. 14, *15; *Dement v. Rokker*, 126 Ill. 189.

³ Chit. Pl. 75, 393; Gould's Pl. 261;

Vieths v. Skinner, 47 Ill. App. 325; See *R. A. Co. v. Middlecoft*, 150 Ill. 27.

⁴ Gould's Pl. 225, 260; as to non-suit, 1 Chit. Pl. 8, 34; *Zuel v. Bowen*, 78 Ill. 234.

⁵ Rev. Stat. (1893), 1075; Rev. Stat. (1895), 1159; 1 Starr & Curtis 1799; *Snell v. De Land*, 43 Ill. 323; *Murphy v. Orr*, 32 Ill. 489; *Dement v. Rokker*, 126 Ill. 189.

unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea *in bar* denying *the partnership or joint liability* or the execution of the instrument sued upon, verified by affidavit.”¹ This enactment differs, in the respects indicated by the words in *italics*, from the former law, under which all the cases on this subject heretofore adjudged were decided.² As therefore the partnership or joint liability of the defendants can now be put in issue by a plea in bar, and as there is a difficulty in pleading a *misjoinder* of *defendants* in abatement—since, though a party may well by his sworn plea deny that he made the alleged promises jointly with another, it may often be impossible for him to say on oath who did make them, and thus to give the plaintiff a better writ—it is presumed that such misjoinder will seldom be pleaded in abatement.

In actions for *torts*, advantage of a misjoinder of *plaintiff's* may also be taken either by plea in abatement or under the general issue;³ but if several persons are sued for a tort committed by one of them only, no advantage can be taken of it, as a misjoinder, in any way.⁴

No. 8. *Plea of another action pending.*

In the ——— Court,

——— Term, A. D. 18——.

C. D.	}	In an action of ———.	And the defendant C. D., by E. F., his attorney, comes and defends the wrong and injury, when, etc., and prays judgment of the said writ (or declaration); because he says, that before the issuing of said writ, to wit, on, etc., in the same court (or other court, describing it by proper title), the plaintiff impleaded the defendant, and issued his said writ, and filed his declaration against him in a plea of trespass on the case on promises, upon the same identical promises and undertakings in the said declaration in the present suit mentioned, as by the record and proceedings thereof, remaining in the said court, more fully appears; and the defendant
ats A. B.			

¹ Rev. Stat. (1893), 1075; *Zuel v. Bowen*, 78 Ill. 234; Rev. Stat. (1895), 1159; 2 Starr & Curtis 1800.

² *Stevenson v. Farnsworth*, 2 Gilm. 715; *Warren v. Chambers*, 12 Ill. 124; *Kelleher v. Tisdale*, 23 Ill. 405; *Warren v. Ball*, 37 Ill. 76.

³ Gould's Pl. 258; see 1 Chit. Pl. 55; *Murphy v. Orr*, 32 Ill. 489.

⁴ 1 Chit. Pl. 74; Gould's Pl. 261; *Baker v. R. R. Co.*, 42 Ill. 73; *Winslow v. Newlan*, 45 Ill. 145.

further says, that the parties to this and the said former suit are the same, and not other or different persons; and that the said former suit so brought and prosecuted against him, the defendant, by the plaintiff as aforesaid, is still depending in the said court; and this the defendant is ready to verify; wherefore he prays judgment of the said writ (or declaration) in this suit, and that the same may be quashed.

G. H., Attorney for Defendant.

(Add affidavit.)

No. 9. *Replication to No. 8. Nul tiel record.*

As in No. 3, ante, to the asterisk:) because he says, that there is not any record of the said supposed former suit remaining in the said — court of the said county of —, in manner and form as the said C. D. has above in his said plea alleged: And this the plaintiff is ready to verify, when, where and in such manner as the court here shall order, etc.

L. M., Attorney for Plaintiff.

The plaintiff may reply *nul tiel record*, as above; or, if there is in truth another suit pending between the same parties for a cause of action similar to that mentioned in the declaration, it would seem proper that the plaintiff should *new assign*—as in the following form—that he is suing for a different cause of action.¹

No. 9a. *Replication to No. 8. New assignment, that suit is for different causes of action.*

(Venue and title of cause.)

And the plaintiff as to the said plea of the defendant, by him — above pleaded, says *precludi non*, because he says that the said several promises and undertakings in the said declaration mentioned, are not, nor are any or either of them, any of, or any one of the same identical promises and undertakings, as those or any of those in the said plea mentioned, and for and in respect whereof the said supposed action now pending in the said plea mentioned was instituted, in manner and form as the defendant has in his said plea alleged; and this the plaintiff prays may be inquired of by the country, etc.

E. F., Att'y for Pl'ff.

It is an ancient rule of the common law that a man shall not be twice vexed for one and the same cause, and the pendency of a former suit in the same jurisdiction between the same parties for the same cause of action and relief may be

¹ 2 Swan's Pr. 652a.

pleaded in abatement of a second suit.¹ The pendency of a proceeding under the mechanic's lien law of Illinois,² or of a prior suit by attachment can not be pleaded in abatement of a suit *in personam* for the same debt, unless, in the latter case, the plea shows that the defendant was personally a party to the suit;³ nor can the pendency of a suit in one state be pleaded in abatement of a second action for the same matter in another state.⁴ In England, the pendency of a prior action in an inferior court can not be pleaded in abatement of an action brought in one of the superior courts.⁵

A writ of error, operating as a *supersedeas*, is pleadable in abatement of another action,⁶ but not if the writ was sued out after the commencement of such other action.⁷ When a second suit is commenced after a writ of error, operating as a *supersedeas*, has been sued out, the court in which the second action is pending will, on application, stay the proceedings until the determination of the writ of error.⁸

A subsequent suit may be abated by an allegation of the pendency of a prior suit, but the reverse of the proposition does not hold in personal actions.⁹ To entitle a defendant to plead another action pending, it is not always necessary that both actions should be between the same parties; it is some-

¹ *Hatch v. Spofford*, 22 Conn. 485; *Wales v. Jones*, 1 Mich. 254; *Bond v. White*, 24 Kan. 45; *Gamsby v. Ray*, 52 N. H. 513; *Wentworth v. Barnum*, 10 Johns. (N. Y.) 238; *Rogers v. Hoskins*, 15 Ga. 270; *Thomas v. Freelon*, 17 Vt. 138; *Branigan v. Rose*, 3 Gilm. 123.

² *Delehay v. Clement*, 3 Scam. 201; *Theilman v. Carr*, 75 Ill. 385.

³ *Branigan v. Rose*, 3 Gilm. 123; *Winthrop v. Carleton*, 8 Mass. 456; *Morton v. Webb*, 7 Vt. 123.

⁴ *McJilton v. Love*, 13 Ill. 486; *Allen v. Watt*, 69 Ill. 655; *Greer v. Young*, 120 Ill. 184; *Williams v. Agra-*

10 Pick. 470; Browne v. Joy, 9 Johns. 221; *Moore v. Spiegel*, 143 Mass. 413.

⁵ 1 Chit. Pl. 392; Gould's Pl. 266.

⁶ *Hailman v. Buckmaster*, 3 Gilm. 498; *Bird v. Caritat*, 2 Johns. 342; *Peynn v. Edwards*, 1 Ld. Raym. 47; *Merritt v. Richey*, 100 Ind. 416.

⁷ *McJilton v. Love*, 13 Ill. 486; *Renner v. Marshall*, 1 Wheat. 215.

⁸ *Hailman v. Buckmaster*, 3 Gilm. 498; 1 Tidd's Prac. 530; 1 Stra. 419; 1 Wils. 120.

⁹ *Renner v. Marshall*, 1 Wheat. 215; *Bird v. Caritat*, 2 Johns. 342; *Callahan v. R. R. Co.*, 61 Mich. 15; *Wood v. Lake*, 13 Wis. 84; *Rizer v. Gilpatrick*, 16 Kans. 564; *Blumenthal v. Taylor*, 44 Ill. App. 139.

times enough if the subject-matter is the same.¹ A suit to recover the price of goods sold, and another to recover the goods on the ground of fraud on the part of the vendee, can not be maintained at the same time.²

The plea of another action pending must aver that it is still pending at the time of the plea pleaded.³ There are decisions to the contrary;⁴ but this is the rule in Illinois, and it is said to rest on the better reasoning and authority.⁵ The defendant may demur when it appears on the face of the papers that there is another action for the same cause pending between the same parties.⁶ The plaintiff can not, after a plea of a prior action pending, avoid the effect of the plea by discontinuing the prior action.⁷

Proof by the defendant of the issuing of a writ for the same cause of action shows *prima facie* the pendency of another suit, and shifts the burden of proof on the plaintiff.⁸ The injustice of entertaining two suits against the same party at the same time, for the same cause of action, is so glaring as to give to a plea of another action pending a more favorable position than one merely dilatory; still the pleader must not neglect any of the essential requirements of the law.⁹

III. PLEAS IN BAR.

A plea in bar is one that impugns the right of action altogether; it is a substantial and conclusive answer to the action. It must either deny all or some material part of the averments of fact in the declaration, or, admitting them to be true, allege new facts which obviate and repel their legal

¹ *McConnell v. Stettenius*, 2 Gilm. 707; *Gould's Pl.* 263, 265.

² *Seligman v. Kalkman*, 8 Cal. 206.

³ 3 Chit. Pl. 905; *Ross v. Nesbit*, 2 Gilm. 252; *Bancroft v. Eastman*, 2 Gilm. 259; *Johnson v. Johnson*, 114 Ill. 611.

⁴ *Commonw. v. Churchill*, 5 Mass. 174; *Frogg v. Long*, 3 Dana 157; *Parker v. Colecord*, 2 N. H. 36; *Prosser v. Chapman*, 29 Conn. 515.

⁵ *Bancroft v. Eastman*, 2 Gilman

259; *Johnson v. Johnson*, 114 Ill. 611; *Garrick v. Chamberlain*, 97 Ill. 620.

⁶ *Moore v. Sheppard*, 1 Met. (Ky.), 97; *Foster Fed. Prac.*, Sec. 108.

⁷ 1 Chit. Pl. 394; *Commonw. v. Churchill*, 5 Mass. 174; but see *Marston v. Dayton*, 1 Johns. 397; *Averill v. Patterson*, 6 Seld. 500.

⁸ *Fowler v. Byrd*, 1 Hemp. 213.

⁹ *Buckles v. Harlan*, 54 Ill. 361.

effect. Pleas in bar are divided into *pleas by way of traverse*, or *denial*, and *pleas by way of confession and avoidance*.

The following rules laid down by STEPHEN, in his work on pleading, may be useful in this place:

1. *Every pleading must be an answer to the whole of what is adversely alleged.*¹

2. *Pleadings must not be double.*²

3. *In general, whatever is alleged in pleading must be alleged with certainty.*³

4. *It is not necessary to allege that which is merely matter of evidence.*⁴

5. *It is not necessary to state matters of which the court takes notice ex officio.*⁵ *Nor matters which would come more properly from the other side.*⁶

6. *It is not necessary to allege circumstances necessarily implied.*⁷ *Nor what the law will presume.*⁸

7. *Pleading must not be insensible or repugnant.*⁹

8. *Pleading must not be argumentative.*¹⁰

9. *Pleading must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that con-*

¹ Andrews' Stephen's Pl., Sec. 132; *Goodrich v. Reynolds*, 31 Ill. 490; *Dickerson v. Hendryx*, 88 Ill. 68; *Hopkins v. Medley*, 97 Ill. 402.

² Ibid. Sec. 142; 1 Chit. Pl. 456; *Ry. Co. v. Ingraham*, 131 Ill. 659; *Kipp v. Bell*, 86 Ill. 577; *R. R. Co. v. Magee*, 60 Ill. 529.

³ Ibid. Sec. 184; Com. Dig. Pl., C. 22, 17; *Harpham v. Haynes*, 30 Ill. 404.

⁴ Ibid. Sec. 136; *Church v. Gilman*, 15 Wend. 656; *Fidler v. Delavan*, 20 Wend. 58; *Clark v. Linebarger*, 44 Ind. 223; *Grun v. Palmer*, 15 Cal. 414; *Hyatt v. McMahon*, 25 Barb. 457.

⁵ Ibid. Sec. 187; *Secrist v. Petty*, 109 Ill. 108; *Oliver v. State*, 4 L. R. A. 1.

⁶ Ibid. Sec. 188; *Romer v. Conter*, 53 Minn. 171.

⁷ Ibid. Sec. 189; *Mulcolm v. O'Reilly*, 89 N. Y. 126; *Jones v. Andrews*, 10 Wall. 327.

⁸ Ibid. Sec. 190; *Henke v. E. E. Ass'n*, 100 Cal. 429; *Campbell v. Cross*, 39 Ind. 155; *Balton v. Cleveland*, 35 Ohio St. 319.

⁹ Ibid. Sec. 197; *Robinson v. Rice*, 20 Mo. 229; *Cronk v. Cole*, 10 Ind. 485; *McKyring v. Bull*, 2 E. D. Smith (N. Y.) —; *Raymond v. People*, 9 Ill. App. 344; *Barber v. Summers*, 5 Blackf. 339; *Hewett v. Brown*, 21 Minn. 163.

¹⁰ Ibid. Sec. 201; *Mishner v. Gran-ger*, 4 Gilm. 78; *Spurck v. Forsyth*, 40 Ill. 440; *Daniels v. Hallenbeck*, 19 Wend. 410; *Daggitt v. Mensch*, 141 Ill. 395.

*struction shall be adopted which is most unfavorable to the party pleading.*¹

10. *Pleadings must not be by way of recital, but must be positive in form.*²

11. *Things are to be pleaded according to their legal effect or operation.*³

12. *There must be no departure in pleading.*⁴

13. *Surplusage is to be avoided.*⁵

SPECIAL PLEAS IN BAR.

It is the essence of special pleas that they confess the truth of the allegations which they propose to answer or avoid. It was formerly the practice in many cases to frame such pleas with a formal confession, using the introductory phrase of "true it is, that," etc., and then proceeding to plead in answer to the matter thus explicitly admitted. But this method is now generally abandoned. It is essential, however, that the confession, though not express, should be distinctly implied in, or inferable from, the matter of the pleading.⁶

If a plea, therefore, purporting to be by way of confession and avoidance (or not pleaded by way of traverse), does not import a confession of the adverse allegations, it is defective, and insufficient.⁷ Pleadings in confession and avoidance should give clear color.⁸ The term *color* signifies an apparent or

¹ Ibid. Sec. 198; *Knoebel v. Kircher*, 33 Ill. 308; *Evans v. Comm'r*, 1 Gilm. 654; *Halligan v. R. R. Co.*, 15 Ill. 558; *Leman v. Stevenson*, 36 Ill. 49; *Vining v. Leeman*, 45 Ill. 246; *Groff v. Ankenbrandt*, 124 Ill. 51; *Claycomb v. Munger*, 51 Ill. 373; *Dougherty v. Catlett*, 129 Ill. 431; *May v. Bank*, 19 Ill. App. 604; *Penna. Co. v. Ellett*, 132 Ill. 662; *Lawrence v. Trainor*, 136 Ill. 485.

² Ibid. Sec. 205; *Hollingsworth v. Holshausen*, 17 Tex. 41; *Curtis v. Richards*, 9 Cal. 33.

³ Ibid. Sec. 206; *Ins. Co. v. Rogers*, 119 Ill. 474.

⁴ Ibid. Sec. 211; *Libby v. Brown*, 4 Pick. 137; *Beard v. Hand*, 88 Ind. 183; *Smith v. Nicolls*, 5 Bing. (N. C.) 208; *Bank v. Hendrickson*, 40 N. J. L. 52; *Murphy v. Bird*, 1 Hemp. 221; *Fiser v. R. R. Co.*, 32 Miss. 539.

⁵ Ibid. Sec. 216; *Knoebel v. Kircher*, 33 Ill. 308; *Dugger v. Oglesby*, 3 Ill. App. 94; *Shepherd v. Field*, 70 Ill. 438; *Goff v. Ry. Co.*, 28 Ill. App. 529.

⁶ Stephen's Pl. 200.

⁷ 1 Saund. 13, 27; *Taylor v. Cole*, 3 Term 298; *McPherson v. Daniels*, 10 Barn. & Cress. 268.

⁸ 1 Chit. Pl. 443, 446.

prima facie right; and the meaning of the rule that pleadings in confession and avoidance should give color, is that they should confess the matter adversely alleged, to such an extent, at least, as to admit some apparent right in the opposite party, which requires to be encountered and avoided by the allegations of new matter.¹

When a plea purporting to be special amounts only to the general issue, it will be obnoxious to a *special* demurrer.² Where the general issue is pleaded, other pleas amounting merely to that issue may be rejected on motion;³ so where two or more pleas are substantially alike, all but one may be rejected on motion.⁴ A special plea always controls, so far as it goes, the general issue.⁵ No matter of defense which denies what the plaintiff would be bound to prove under the general issue should be pleaded specially.⁶

A special plea which simply traverses a portion of the facts which the plaintiff is bound to prove to establish his right to recover under the declaration, is bad, as amounting to the general issue.⁷ The object of special pleading is to present one single isolated question, or point in issue, so as to avoid confusion; but as many distinct facts as may be necessary to present one cause of action, or defense, may be set forth in one count or plea.⁸

A special plea in bar, which commences as an answer to the whole declaration, and answers only one count, is bad.⁹ Every

¹ Steph. Pl. 203.

² *Abrams v. Pomeroy*, 13 Ill. 133; *Curtis v. Martin*, 20 Ill. 557; *Quincy v. Warfield*, 25 Ill. 317; *Knoebel v. Kircher*, 33 Ill. 308; *Johnson v. University*, 35 Ill. 518; *Ogden v. Lucas*, 48 Ill. 492; *Manny v. Rixford*, 44 Ill. 129; *Ferry Co. v. Blakeman*, 54 Ill. 201.

³ *Knoebel v. Kircher*, 33 Ill. 308; *R. R. Co. v. Johnson*, 34 Ill. 389; *Manny v. Rixford*, 44 Ill. 129.

⁴ *Lomax v. Bailey*, 7 Ind. 599; *Wallace v. Seales*, 36 Miss. 53.

⁵ 12 La. An. 739.

⁶ *Thayer v. Brewer*, 15 Pick. 217; *Martin v. Woods*, 6 Mass. 6.

⁷ *Edwards v. Trustees*, 30 Ill. App. 528.

⁸ *Hereford v. Crow*, 3 Scam. 423; *White v. Clages*, 32 Ill. 325; *Ins. Co. v. Wusterhausen*, 75 Ill. 285.

⁹ *Hinton v. Husbands*, 3 Scam. 187; *Buckmaster v. Beames*, 4 Gilm. 443; *Goodrich v. Reynolds*, 31 Ill. 490; *Allen v. Breusing*, 32 Ill. 505; *Hatfield v. Cheaney*, 76 Ill. 488; *Glickauf v. Hirschorn*, 73 Ill. 574; *Ins. Co. v. Holly*, 81 Ill. 353; *People v. McCormack*, 68 Ill. 226; *Dickerson v. Hendryx*, 88 Ill. 66.

plea must answer all that it assumes to answer, and no more.¹ A special plea admits every material allegation except the one put in issue.² A distinct averment, which can be stricken out without injuring the other averments, will not vitiate a pleading,³ unless it renders the pleading double. The allegations of the plea and the proof must correspond.⁴ A plea is defective which is not good as a defense for all who interpose it. Matters of defense affecting a surety only should be pleaded by him alone, and not with his principals.⁵ A defendant proving one of several pleas in bar is entitled to judgment.⁶ When a law of another state is relied on for a defense, it must be pleaded.⁷

Must answer all that it professes to answer.—It is a familiar rule that a plea which professes to answer the whole declaration, but only answers a part, is bad.⁸

Pleas, etc., as to a part, etc.—It is to be observed, that a plea which only contains an answer to a part of the declaration must be qualified accordingly in the commencement; and a like rule applies to all subsequent pleadings. Such a plea may commence: “And for a further plea in this behalf, as to all the counts of the said declaration except the last,” or “as to all the several supposed promises in the said declaration mentioned, except as to the sum of — dollars, parcel of the sums of money in the said declaration mentioned,” (or as the case may be,) “the defendant says that the plaintiff ought not to have his aforesaid action,” etc. In like manner, a replica-

¹ *Warren v. Nexen*, 3 Scam. 38; *Snyder v. Gaither*, 3 Scam. 91; *Chadsey v. Brooks*, 2 Gilm. 378; *Goodrich v. Reynolds*, 31 Ill. 490; *Barclay v. Ross*, 32 Ill. 211; *R. R. Co. v. Read*, 37 Ill. 484; 1 Chit. Pl. 453.

² *Waggeman v. Lombard*, 56 Ill. 42; *McClure v. Williams*, 65 Ill. 390; Gould's Pl. 317; *People v. Gray*, 72 Ill. 343.

³ *Bank v. Billings*, 17 Pick. 87; *Stevens v. Bigelow*, 12 Mass. 433.

⁴ *Spangler v. Pugh*, 21 Ill. 85; *Sherman v. Blackman*, 24 Ill. 347.

⁵ *Beesley v. Hamilton*, 50 Ill. 88.

⁶ *Leiter v. Day*, 35 Ill. App. 248; *McClure v. Williams*, 65 Ill. 390.

⁷ *Chumasero v. Gilbert*, 24 Ill. 293; *Mason v. Dousay*, 35 Ill. 424.

⁸ *Peabody v. Kendall*, 145 Ill. 519; *People v. McClellan*, 137 Ill. 352; *Titeomb v. Straight*, 57 Ill. App. 331; *Rent Co. v. Hutchinson*, 25 Ill. App. 476.

tion may commence: "And as to the said plea of the defendant by him secondly above pleaded, so far as the same relates to the several promises in the said first and third counts of the said declaration mentioned, the plaintiff says that he ought not, by reason of anything in that plea alleged, to be barred," etc.

Common and special similiter to plea, etc.—When the defendant pleads only one plea, concluding to the country, the issue is made up by adding, at the end of the plea, the common *similiter*, in these words: "And the plaintiff does the like." When, however, there are several pleas, some concluding to the country, and others with a verification, the special *similiter*, as below, is proper as a replication to all the former, inserting the words "secondly," "thirdly," etc., "above pleaded," etc. This applies also to the making up of issues on replications, rejoinders, etc., concluding to the country.

No. 10. Special similiter to plea.

In the ——— Court.

— Term, 18—.

A. B.	}	<i>Assumpsit.</i>
vs.		
C. D.	}	And the plaintiff, as to the plea of the defendant by him first above pleaded, and whereof he has put himself upon the country, does the like.

Leave to file pleas.—When a defendant is in default and asks the court to allow him to file certain pleas, he will be required to present with his motion good pleas. This rule does not apply where general leave to plead is given. If pleas filed thereunder are defective, the defect can be reached only by demurrer.¹

Additional pleas—Leave to file.—It is a matter of discretion with the court whether to allow a defendant to file additional pleas, and its action will not be revived unless it shall appear that such discretion has become abused.² An affidavit

¹ *Bemis v. Homer*, 145 Ill. 567.

² *Dow v. Blake*, 148 Ill. 76; *City v. Water Co.*, 140 Ill. 445; *Ricker v. Scofield*, 28 Ill. App. 32; *Bryant v.*

Dana, 3 Gilm. 344; *Booth v. Brown*, 66 Ill. 419; *Haas v. Stenger*, 75 Ill. 597; *Lewis v. Lynch*, 61 Ill. App. 476.

is not essential to justify leave to file additional pleas where it is not required by statute and all the facts are known to the court.¹

When a plaintiff is permitted to amend his declaration in a material respect, the defendant should be permitted to file additional pleas.²

See DEFENSES TO THE ACTION OF ASSUMPSIT, *post*, and pleadings in bar under title of the respective forms of action.

REPLICATIONS TO PLEAS.

For forms of replications in particular cases, see Defenses to the Action of Assumpsit, *ante*, and pleadings in bar under titles of the respective forms of action.

No. 11. *Double replications.*

(*Venue, and title of cause.*)

And the plaintiff, as to the said plea of the defendant, by him — above pleaded, says, *precludi non*, because he says, etc.: (*Here set out first replication.*)

And the plaintiff, by special leave of the court, here first had and obtained, according to the form of the statute in that case made, as to the said — plea of the defendant above pleaded, further says, *precludi non*, because he says: (*Here insert second replication.*)

E. F., Att'y for Pl'ff.

No. 12. *Similiter to replication, concluding to the country.*

(*Venue, and title of cause.*)

And the defendant, as to the said replication of the plaintiff to the — plea of the defendant, and which the plaintiff has prayed may be inquired of by the country, doth the like.

G. H., Att'y for Def't.

REJOINDERS TO REPLICATIONS.

No. 13. *Commencement of a rejoinder to replication to a special plea.*

(*Venue, and title of cause.*)

And the defendant, as to the said replication of the plaintiff to the — plea of the defendant, says, that the plaintiff ought not, by reason of anything by him in that replication alleged, to have or maintain his aforesaid action thereof against him, the defendant, because he says, that, etc.: (*Here insert*

¹ *G. W. T. & Co. v. Lowenthal*,
154 Ill. 261.

² *Griswold v. Shaw*, 79 Ill. 449;
McCarthy v. Neu, 91 Ill. 127.

the subject-matter of the rejoinder, and if it deny the replication conclude thus:) And of this the defendant puts himself upon the country, etc.

G. H., Att'y for Def't.

No. 15. Conclusion of a rejoinder with a verification.

And this the defendant is ready to verify, wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against the defendant.

G. H., Att'y for Def't.

No. 16. Rejoinder to a double replication.

(Venue, and title of cause.)

And the defendant says that the plaintiff, by reason of anything in the replication of the plaintiff first above pleaded, ought not to have or maintain, etc., because the defendant says: *(Here insert first rejoinder.)*

And as to the matters contained in the plaintiff's replication secondly above pleaded, the defendant further says that the plaintiff, by reason of anything contained in such replication last mentioned, ought not, etc., because the defendant says, etc.: *(Insert second rejoinder.)* And this the defendant prays may be inquired of by the country, etc.

G. H. Att'y for Def't.

IV. DEMURRERS.

The following notes and observations upon the subject of demurrers are applicable to the various forms of action. If the defendant, upon examination of the declaration, is satisfied that it is not sufficient in point of law to maintain the action, he should demur. If some of the counts are good and some bad, he should plead to the good counts, and demur to the bad ones. The demurrer will present an issue in law upon the facts stated in the declaration or counts, and this issue the plaintiff is bound to accept, or abandon his suit.

Nature of.—A demurrer is an allegation that, admitting the facts of the preceding pleading to be true, as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. It is a declaration that the party demurring will go no further because the other has shown nothing against him. It imports that the objecting party will not proceed, but will wait the judgment of the court whether he is bound to do so.¹ A party can not demur and plead at the same time to the

¹ 1 Bouv. Law Dict., 507.

same count or plea.¹ A demurrer may be to the whole or a part of the pleading; but if to the whole, and a part be good, it will be overruled.²

May be carried back.—A party should not demur unless he is certain that his own previous pleading is substantially correct, for it is an established rule, that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance.³ But where the general issue is filed, a demurrer can not be carried back to the declaration.⁴

The general rule that a demurrer may be carried back and sustained to the first defective pleading, does not apply so as to carry a demurrer behind a plea in abatement.⁵ The rule applies only where the previous pleading is bad in substance, and not defective merely in form.⁶

A demurrer to a special plea can not be carried back to the declaration, after a direct demurrer to the declaration has been overruled, and the general issue pleaded.⁷ A plea of *non est factum*, in covenant, not being the general issue, will not prevent a demurrer to a special plea from being carried back to the declaration.⁸

¹ *Am. Ex. Co. v. Pinckney*, 29 Ill. 392; *Claycomb v. Munger*, 51 Ill. 373; *Eldbrook v. Cooper*, 79 Ill. 582; *Gradle v. Hoffman*, 105 Ill. 147.

² *Walton v. Stephenson*, 14 Ill. 77; *Horan v. People*, 10 Bradw. 21; *Morehead v. Yearzee*, 10 Bradw. 263; *Tipton v. Corrigan*, 10 Bradw. 318; *People v. Weber*, 92 Ill. 288; *Mix v. People*, 92 Ill. 549; *Bonham v. People*, 102 Ill. 434; *Reece v. Smith*, 94 Ill. 362.

³ 1 Chitty Pl., 580; *Phoebe v. Jay*, Breese, 268; *McDonald v. Wilkie*, 13 Ill. 22; *R. R. Co. v. Neill*, 16 Ill. 269; *Culver v. Bank*, 64 Ill. 528; *Chestnut v. Chestnut*, 77 Ill. 346; *Ins. Co. v. Stanton*, 57 Ill. 354; *Safford v. Miller*, 59 Ill. 205; *People v. McCormick*, 106 Ill. 184; *Stearns v. Cope*, 109

Ill. 340; *Dupee v. Blake*, 148 Ill. 453; *Schalucky v. Field*, 124 Ill. 617; *Dunlap v. Ry. Co.*, 151 Ill. 409; *People v. Spring Valley*, 129 Ill. 169.

⁴ *Mount v. Hunter*, 58 Ill. 246; *Culver v. Bank*, 64 Ill. 528; *Bills v. Stanton*, 69 Ill. 51; *R. R. Co. v. Lurton*, 72 Ill. 118; *Compton v. People*, 86 Ill. 176; *Felsenthal v. Durand*, 86 Ill. 230; *Shunick v. Thompson*, 25 Ill. App. 619.

⁵ *Ryan v. May*, 14 Ill. 49; 1 Chit. Pl. 405.

⁶ *Tubbs v. Caswell*, 8 Wend. 129; *Hooker v. Gallagher*, 6 Florida 351; *Patton v. Hamner*, 28 Ala. 618; *Wales v. Lyon*, 2 Mich. 276.

⁷ *Brawner v. Lomax*, 23 Ill. 496.

⁸ *Reeves v. Forman*, 26 Ill. 313.

Effect of demurrer.—A demurrer admits all such matters of fact as are well pleaded;¹ but not the arguments or legal conclusions in the pleading.² Where a demurrer is overruled to any pleading its sufficiency is established.³

Pleading over.—Where a demurrer to a pleading has been sustained, it is within the judicial discretion and almost a matter of course to allow an amendment; and where a demurrer to a pleading has been overruled, like liberal practice prevails in the State of Illinois, and it is almost or quite a matter of course to allow the party demurring, to plead over.⁴

Waiver of demurrer.—Where a party files a demurrer which is overruled, and he pleads without standing by his demurrer, the demurrer is waived.⁵ By pleading to a declaration after the overruling of a demurrer, a party waives his right to move in arrest of judgment,⁶ and to assign the decision of the court as error.⁷ A plea to the merits is a waiver of a demurrer, but a demurrer does not waive a plea of that kind.⁸

¹ 1 Chit. Pl. 662; *Compher v. People*, 12 Ill. 290; *Deem v. Crume*, 46 Ill. 69; *Lindley v. Miller*, 67 Ill. 244; *Barrow v. Window*, 71 Ill. 214; *Nispel v. Laparle*, 74 Ill. 306; *People v. Holden*, 82 Ill. 93; *Arenz v. Weir*, 89 Ill. 25; *Greig v. Russell*, 115 Ill. 483; *Cerveny v. C. D. N. Co.*, 139 Ill. 345; *People v. Cooper*, 139 Ill. 461; *R. R. Co. v. Horan*, 131 Ill. 288; *Dement v. Rokker*, 126 Ill. 174; *Daggitt v. Mensch*, 141 Ill. 395.

² *Compher v. People*, 12 Ill. 290; *Nispel v. Laparle*, 74 Ill. 306; *People v. Holden*, 82 Ill. 93; *Johnson v. Roberts*, 102 Ill. 655; *Greig v. Russell*, 115 Ill. 483.

³ *Miles v. Danforth*, 37 Ill. 156; *Hunter v. Bilyeu*, 39 Ill. 367.

⁴ *Stanton v. Kinsey*, 151 Ill. 301.

⁵ *McLaughlin v. People*, 17 Bradw. 306; *Beer v. Philips*, Breese 44; *Godfrey v. Buckmaster*, 1 Scam. 447; *Gilbert v. Maggord*, 1 Scam. 471; *McFadden v. Fortier*, 20 Ill. 509;

Snyder v. Gaither, 3 Scam. 91; *Gardner v. Haynie*, 42 Ill. 291; *Camp v. Small*, 44 Ill. 37; *Russell v. Adm.*, 4 Scam. 7; *Granger v. Warrington*, 3 Gilm. 299; *Gordon v. Reynolds*, 114 Ill. 118; *R. R. Co. v. Hill*, 14 Bradw. 579; *Barnes v. Brookman*, 107 Ill. 317; *R. R. Co. v. Morgenstern*, 106 Ill. 216; *Dunlap v. Ry. Co.*, 151 Ill. 409.

⁶ *Shreffler v. Nadelhoffer*, 133 Ill. 536; *I. O. M. v. Paine*, 23 Ill. App. 171.

⁷ *McFadden v. Fortier*, 20 Ill. 509; *Walker v. Welch*, 14 Ill. 277; *Brown v. Ins. Co.*, 42 Ill. 366; *Vanderbilt v. Johnson*, 3 Scam. 49; *Geary v. Bangs*, 138 Ill. 77; *R. R. Co. v. Sampson*, 31 Ill. App. 513; *McFarlan v. Claypool*, 128 Ill. 397; *Ambler v. Whipple*, 139 Ill. 311; *Foltz v. Hardin*, 139 Ill. 405.

⁸ *Marshall v. Duke*, 3 Scam. 67; see *Am. Ex. Co. v. Pinckney*, 29 Ill. 392.

May be general or special.—A demurrer may be *general* or *special*. A *general* demurrer is one which excepts to the sufficiency of a previous pleading in general terms, without pointing out specifically the nature of the objection; and such demurrer is on matters of substance.¹

A *special* demurrer is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection, and the particular ground of exception. It is necessary where the objection is to the form.² Under a special demurrer no objections as to form can be made other than those stated in the demurrer itself.³ But the party may, on argument, not only take advantage of the particular faults which his demurrer specifies, but also all objections in substance.⁴

Although a declaration may be good in substance, yet if technically defective, a special demurrer for such defect will lie.⁵

A demurrer for matter of form should in all cases be special,⁶ and the particular exceptions intended to be relied on should be minutely set forth.⁷ An objection for matter of form, not noticed in a special demurrer, will not be regarded by the court.⁸ A single count may be divisible, part good and part bad; in such a case a demurrer to the count generally will not be sustained.⁹

Duplicity can be taken advantage of only by special demurrer,¹⁰ stating in what the duplicity consists.¹¹ The objec-

¹ 1 Chit. Pl. 574, 639; *Mut. Acc. Ass'n v. Tuggles*, 138 Ill. 428.

² *Reed v. Walker*, 52 Ill. 333; *Holmes v. R. R. Co.*, 94 Ill. 439.

³ *Dryer Co. v. C. T. Bank*, 50 Ill. App. 461. *Cover v. Armstrong*, 66 Ill. 267; *Holmes v. R. R. Co.*, 94 Ill. 439.

⁴ 1 Chit. Pl. 576.

⁵ *Ry. Co. v. People*, 149 Ill. 663; *Matson v. Swanson*, 131 Ill. 255.

⁶ Chit Pl. 574; *Dole v. Weeks*, 4 Mass. 451; *Lyon v. Fish*, 20 Ohio,

100; *Bodwell v. Parsons*, 10 East. 359.

⁷ *Bogardus v. Trial*, 1 Scam. 63; 1 Chit. Pl. 642; *Stoph. Pl.* 159-161.

⁸ *Snyder v. Croy*, 2 Johns. 428; *Read v. Walker*, 52 Ill. 333.

⁹ *Lusk v. Cook*, Breese, 84; *Ins. Co. v. Menz*, 63 Ill. 116; *Henrickson v. Reinback*, 33 Ill. 299; *Stout v. Whitney*, 12 Ill. 218.

¹⁰ *Franey v. True*, 26 Ill. 184; *Kipp v. Bell*, 86 Ill. 577; 1 Chitty Pl. 574.

¹¹ *Kipp v. Bell*, 86 Ill. 577.

tion that a pleading is argumentative can only be made by special demurrer, showing wherein the pleading is argumentative.¹ If it appears on the face of the declaration that the plaintiff has neglected to sue a joint contractor, a defendant may demur for that cause.² A plea amounting to the general issue is bad on special demurrer;³ but the objection can not be taken on general demurrer.⁴

A general demurrer to a declaration containing several counts, one of which is good, and the others bad, can not be sustained.⁵ On demurrer to a declaration reciting a written contract, and the circumstances under which it was made, the writing must be construed in the light in which it is presented by the declaration.⁶

Where there are several counts in a declaration, and the defendant demurs to the whole declaration, and says that the several counts are not sufficient in law, "nor is either of them," etc., his demurrer will be regarded as separate to each count, and may be sustained as to such counts as are bad, and overruled as to the others;⁷ but it is otherwise where the demurrer is to "both counts."⁸

If the defendant wishes to avail himself of a defective averment in a declaration, he must demur to it; if he elects to plead to the declaration and go to trial, he has no right to insist upon the exclusion of evidence because some necessary

¹ *Cover v. Armstrong*, 66 Ill. 267.

² *McArthur v. Ladd*, 5 Ohio 514; *Stevenson v. Cofferin*, 20 N. H. 150; *Dement v. Rokker*, 126 Ill. 191; 1 Chit. Pl. 13, 14.

³ *Cook v. Scott*, 1 Gilm. 333; *Jackson v. Hobson*, 4 Scam. 412; *Abrams v. Pomeroy*, 13 Ill. 133; *Quincy v. Warfield*, 25 Ill. 317; *Knoebel v. Kircher*, 33 Ill. 308; *Johnson v. University*, 35 Ill. 518; *Ferry Co. v. Blakeman*, 54 Ill. 201; *Governor v. Lagow*, 43 Ill. 134; *McEwen v. Kerfoot*, 37 Ill. 530.

⁴ *Cushman v. Hayes*, 46 Ill. 145; *Ogden v. Lucas*, 48 Ill. 492.

⁵ *Israel v. Reynolds*, 11 Ill. 218;

Governor v. Ridgeway, 12 Ill. 14; *Stout v. Whitney*, 12 Ill. 218; *Walton v. Stephenson*, 14 Ill. 77; *Gillilan v. Gray*, 14 Ill. 416; *Stacy v. Baker*, 1 Scam. 417; *Cowles v. Litchfield*, 2 Scam. 356; *Prather v. Vineyard*, 4 Gilm. 40; *Nash v. Nash*, 16 Ill. 79; *Tomlin v. R. R. Co.*, 23 Ill. 429; *Bristow v. Lane*, 21 Ill. 194; *Barber v. Whitney*, 29 Ill. 439; *Nickerson v. Sheldon*, 33 Ill. 372; *Reece v. Smith*, 94 Ill. 362; *Ins. Co. v. Frisch*, 29 Ill. App. 265.

⁶ *Stout v. Whitney*, 12 Ill. 218.

⁷ *Sanford v. Gaddis*, 13 Ill. 329.

⁸ *Bristow v. Lane*, 21 Ill. 194.

avermment is omitted or defectively set forth.¹ Where a defective plea is filed, the proper mode to meet and dispose of it is by demurrer—not to entirely disregard it as no plea.² Counts in debt and assumpsit can not be joined; and a demurrer to a plea in such a case should be carried back to the declaration.³

Where the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favor of the plea, judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; for the reason that upon the whole it appears the plaintiff had no cause of action.⁴

So where there are two pleas, and replications to both, to which demurrers are interposed, if the replications are defective, and one of the pleas is good, and goes in bar of action, the plaintiff standing by his defective replication, judgment in chief will go for the defendant, although the other plea is bad; for one party can not have a judgment upon the law, and the other upon the facts.⁵ A failure to abide by a demurrer precludes the taking advantage on error of any defect in the pleadings.⁶

A plaintiff can not crave oyer of a judgment pleaded, and demur. The plea should be traversed.⁷ If an unanswered demurrer is on record, and the party demurring goes to trial by consent, it will not be cause for reversal of the judgment.⁸ Taking leave to amend a plea demurred to, will be held as equivalent to a confession of the demurrer.⁹ The statute of limitations may be interposed by demurrer, where the petition or declaration discloses the proper facts to raise the question.¹⁰

¹ *Greathouse v. Robinson*, 3 Scam. 7.

² *Mix v. People*, 86 Ill. 329.

³ 1 Chit. Pl. 231; *Adams v. Hardin*, 19 Ill. 273.

⁴ *Ward v. Stout*, 32 Ill. 399; *Miles v. Danforth*, 37 Ill. 156.

⁵ *Ward v. Stout*, 32 Ill. 399; see *Miles v. Danforth*, 37 Ill. 156; *Hunter v. Bilyeu*, 39 Ill. 367.

⁶ *Camp v. Small*, 44 Ill. 37; *O. M. A. v. Paine*, 122 Ill. 625; *Ambler v.*

Whipple, 139 Ill. 311; *Foltz v. Hardin*, 139 Ill. 405.

⁷ *Hanna v. Yocum*, 17 Ill. 387.

⁸ *Parker v. Palmer*, 22 Ill. 489; *Davis v. Ransom*, 26 Ill. 100.

⁹ *Haven v. Green*, 26 Ill. 252.

¹⁰ *The People ex rel. v. Boyd et al.*, 132 Ill. 60; *Houston v. Workman*, 28 Ill. App. 626; *City v. College*, 56 Ill. App. 372.

Judgment upon demurrer.—When a judgment is given against a party on demurrer to a pleading, if he wishes to obtain a review of the judgment he must stand by his pleading.¹ Where a demurrer to a plea is overruled, the court should render judgment for the defendant unless the plaintiff asks and obtains leave to withdraw the demurrer and reply.²

A judgment upon demurrer for defect in pleading will not bar another action for the same cause.³ The proper judgment in overruling a demurrer to a plea in abatement is, that the writ be quashed.⁴ And if the demurrer is sustained, the judgment is *quod respondeat ouster*.⁵

Where a demurrer of a plaintiff to a plea is overruled, and he abides his demurrer, the court will render a judgment for the defendant.⁶ It is error to take judgment on a demurrer to special counts, while a plea to other counts remains undisposed of.⁷

Demurrer to evidence.—A demurrer to evidence is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed further because the evidence offered on the other side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party the jury are in general excused from giving any verdict.⁸ As the only question presented on a demurrer to evidence is whether the evidence is sufficient, in law, to maintain the issues of fact, no exception can, on such demurrer, be taken to any defect in the pleadings. The demurrer does not extend to them.⁹

¹ *Lullman v. Barrett*, 18 Bradw. 573; *Gilbert v. Maggard*, 1 Scam. 471; *Snyder v. Gaither*, 3 Scam. 91; *Gardner v. Haynie*, 42 Ill. 291; *Snell v. Cottingham*, 72 Ill. 161; *McCormick v. Tate*, 20 Ill. 334; *Camp v. Small*, 44 Ill. 37.

² *Weatherford v. Wilson*, 2 Scam. 253.

³ *Vallandingham v. Ryan*, 17 Ill. 25; *Lampen v. Hedgewin*, 1 Mod. 207; *Gilman v. Rives*, 10 Pet. 301; *Wilbur v. Gilmore*, 21 Pick. 253; *Gould v. R. R. Co.*, 91 N. J. 526.

⁴ *Motherell v. Beaver*, 2 Gilm. 69; *Cushman v. Savage*, 20 Ill. 330.

⁵ *Ryan v. May*, 14 Ill. 49; 1 Chit. Pl. 405.

⁶ *Weatherford v. Wilson*, 2 Scam. 253; *Ward v. Stout*, 32 Ill. 399; *Miles v. Danforth*, 37 Ill. 156; *R. R. Co. v. Andrews*, 53 Ill. 176; *Hull v. Johnston*, 90 Ill. 604.

⁷ *McAllister v. Ball*, 24 Ill. 149.

⁸ *Andrews' Steph. Pl.* § 93; see *Crowe v. People*, 92 Ill. 231.

⁹ *Rothschild v. Bruscke et al.*, 131 Ill. 265.

No. 17. *Demurrer to a declaration.*

In the ——— Court.

—— Term, 18 —.

C. D. }
 ats. } *Assumpsit.*
 A. B. } And the defendant, by E. F., his attorney, comes and defends, etc., when etc., and says, that the said declaration, *and each count thereof* (or “the said first count of the said declaration”), and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his aforesaid action, and that he, the defendant, is not bound by law to answer the same; and this he is ready to verify: Wherefore, for want of a sufficient declaration (or “first count,” etc.) in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining his aforesaid action, etc.

When the demurrer is designed to be special, add to the above form as follows :

And the defendant shows to the court here the following causes of demurrer to the said declaration, *and each count thereof* (or, “first count”), that is to say, that (*here set forth the particular causes, and conclude thus*): And also that the said declaration, *and each count thereof* (or, “first count”), is in other respects uncertain, informal and insufficient, etc.

If desired, the several causes of demurrer can be set forth in separate paragraphs, and numbered.

No. 18. *Joinder in a demurrer to a declaration or replication.*

In the ——— Court.

—— Term, 18—.

A. B. }
 vs. } *Assumpsit.*
 C. D. } And the plaintiff says, that the said declaration (or “first count,” or “replication”) and the matters therein contained, in manner and form as the same are above set forth, are sufficient in law for him to maintain his aforesaid action; and he is ready to verify the same, as the court here shall direct: Wherefore, inasmuch as the defendant has not denied the said declaration (or “first count,” or “replication,”), the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

A joinder in a demurrer to a declaration or replication in debt, covenant, detinue, case or trespass, is like the above form, except in the prayer of judgment, which is the same as in the conclusion of a replication in the particular form of action.

The two following forms, prescribed in England by the rule

of court of Hil. T. 4 Will. IV., are given in Stephen on Pleading, pages 45 and 56 respectively.

No. 19. General demurrer to a declaration.

(*Title of court, etc.*) And the said defendant, by — his attorney, says that the declaration is not sufficient in law.

No. 20. Demurrer to a plea in abatement.

(*Title of court, etc., as in No. 18, ante.*) And the plaintiff says, that the said plea of the defendant, and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to quash the said writ, and that he, the plaintiff, is not bound by law to answer the same; and this he is ready to verify: Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays judgment, and that the defendant may answer further to the said declaration, etc.

Special causes of demurrer may be added, as suggested under form No. 17, *ante*. It is said that the plaintiff need never demur specially to a plea in abatement, but that it appears most advisable to do so when the plea is merely informal.¹

No. 21. Joinder in a demurrer to a plea in abatement.

(*Title of court, etc., as in No. 17, ante.*) And the defendant says, that his plea, and the matters therein contained, in manner and form as the same are above pleaded, are sufficient in law to quash the said writ; which said plea, and the matters therein contained, he is ready to verify, as the court here shall direct: Wherefore, inasmuch as the plaintiff has not denied the said plea, the defendant as before prays judgment of the said writ, and that the same may be quashed, etc.

A demurrer to a plea to the jurisdiction, and a joinder in such demurrer, will follow the language of the plea. After a demurrer to a plea in abatement has been overruled, the court can not grant leave to reply to the plea.²

No. 22. Demurrer to a plea in bar.

(*Similiter to general issue, as ante, No. 10.*) And the plaintiff, as to the plea of the defendant by him *secondly* above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above

¹ Chit. Pl. 404, 576.

Pl. 405; *Motherell v. Beaver*, 2 Gilm.

² *Eddy v. Brady*, 16 Ill. 306; *Cushman v. Savage*, 20 Ill. 330; 1 Chit.

69; *McKinstry v. Pennoyer*, 1 Scam. 319.

pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action, and that he is not bound by law to answer the same; and this he is ready to verify: Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

Special causes of demurrer may be added, as suggested under form No. 17, *ante*.

In debt, the plaintiff "prays judgment, and his debt aforesaid, together with his damages, etc., to be adjudged to him," etc.¹

No. 23. Joinder in a demurrer to a plea in bar.

(*Title of court, etc., as in No. 17, ante.*) And the defendant says, that his said plea by him *secondly* above pleaded, and the matters therein contained, in manner and form as the same are above pleaded, are sufficient in law to bar the plaintiff from having his aforesaid action; and he, the defendant, is ready to verify the same, as the court here shall direct: Wherefore, inasmuch as the plaintiff has not denied the said plea, the defendant prays judgment, and that the plaintiff may be barred from having his aforesaid action, etc.

Joinder in demurrer.

(*Title of court, etc.*) And the plaintiff says that the declaration is sufficient in law.

It will be observed that these forms contain no prayer of judgment.

¹ *Motherell v. Beaver*, 2 Gilm. 69; *Kinstry v. Pennoyer*, 1 Scam. 319; 1 *Cushman v. Savage*, 20 Ill. 330; *Mc-* Chit. Pl. 405.

CHAPTER IV.

ASSUMPSIT.

Nature of the action.—Assumpsit in the matter of contracts, is an undertaking, either expressed or implied, to perform a parol contract. An action of assumpsit, so called, is an action on the case, and is properly entitled an action of trespass on the case.¹ It is an equitable action.² It differs from *debt*, since the amount claimed need not be liquidated, and from *covenant*, since it does not require a contract under seal to support it.³

Express assumpsit is an undertaking made orally, by writing, not under seal, or by matter of record, to perform an act or to pay a sum of money to another.

Implied assumpsit is an undertaking presumed in law to have been made by a party, from his conduct, although he has not made an express promise. The law presumes such an undertaking or promise to have been made, on the ground that every person is supposed to have undertaken to do what is, in point of law, just and right. Such an undertaking is never implied where the party has made an express promise; nor ordinarily against the express declaration of the party to be charged.⁴ Nor will it be implied unless there be a request or assent by the defendant shown,⁵ though such request or assent may be inferred from the nature of the transaction,⁶ or from

¹ *Carter v. White*, 32 Ill. 509; Comyns' Dig.; 1 Chit. Pl. 111, 112.

² *Smith v. Riddell*, 87 Ill. 165; *Sandoval v. Main*, 23 Ill. App. 395; *Watson v. Woolverton*, 41 Ill. 241; *Bennett v. Connelly*, 103 Ill. 50.

³ See *Debt and Covenant*, *post*; *North v. Nichols*, 37 Conn. 375.

⁴ Bouv. L. D. 159; 2 Greenleaf Ev., Sec. 103; *Jewett v. Somerset*, 1 Maine 125; *Wheelock v. Freeman*, 13 Pick. 165.

⁵ Greenleaf Ev., Sec. 107; *Webb v. Cole*, 20 N. H. 490.

⁶ *Hawley v. Sage*, 15 Conn. 52; *Hall v. R. R. Co.*, 28 Vt. 401.

the silent acquiescence of the defendant;¹ or even contrary to fact, on the ground of legal obligation.²

Special assumpsit is an action of assumpsit brought upon an express contract or promise; and **GENERAL ASSUMPSIT** is an action of assumpsit brought upon the promise or contract implied by law in certain cases.

In order to support *assumpsit* there must be a promise or undertaking on the part of the defendant, express or implied, for a promise or contract is the very gist of the action.³ An express promise excludes an implied one.⁴ A promise is a sufficient consideration for a promise upon which to found an action.⁵

Where the action lies.—The action of assumpsit lies where a party claims damages for a breach of a simple contract, a contract not under seal; and such promise may be implied as well as expressed. The law always implies a promise to do that which a party is liable to perform.⁶

Where the duty for the breach of which an action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in assumpsit, and not in tort, when otherwise, case is an appropriate remedy.⁷ It lies whenever the defendant has obtained money of the plaintiff, which in equity and good conscience he has no right to retain.⁸

¹ 22 Am. Jur. 2; *Doty v. Wilson*, 14 Johns. 378; *Bradley v. Richardson*, 2 Blatch. 343; *Campbell v. Day*, 90 Ill. 363.

² *Alna v. Plummer*, 4 Maine 258; *McCloskey v. Miller*, 72 Pen. St. 151; 1 Chit. Pl. 98, 99; *Hanover v. Turner*, 14 Mass. 227; *Hapgood v. Houghton*, 10 Pick. 156; *Wheelock v. Brinck*, 13 Johns. 480; *Force v. Haines*, 17 N. J. L. 385.

³ *Farmer Co. v. Taylor*, 69 Ill. 440; *Wings v. Brown*, 12 Rich. 279; *Lanchester v. Frewer*, 2 Bing. 361; *Candler v. Rossiter*, 10 Wend. 487.

⁴ *Compton v. Payne*, 69 Ill. 354.

⁵ *Gilfillan v. Farrington*, 12 Bradw. 101; *Funk v. Hough*, 29 Ill. 145.

⁶ *Frazer v. Carpenter*, 2 McLean 237; *Metcalf v. Robinson*, 2 McLean 334.

⁷ *Nevin v. P. P. C. Co.*, 106 Ill. 222.

⁸ *Trumbull v. Campbell*, 3 Gilm. 502; *Stephenson v. Manny*, 56 Ill. 160; *Taylor v. Taylor*, 20 Ill. 650; *Sangamon v. Springfield*, 63 Ill. 66; *Alderson v. Ennot*, 45 Ill. 128; *Allen v. Stenger*, 74 Ill. 119; *Belden v. Perkins*, 78 Ill. 449; *Barnes v. Johnson*, 84 Ill. 95; *Laflin v. Howe*, 112 Ill. 253;

It lies to recover money lent by the plaintiff to the defendant, or paid by the plaintiff on account of the defendant at his request; or for money had and received by the defendant to the plaintiff's use; against an officer for fees illegally taken;¹ or for money unlawfully demanded;² against a municipality for taxes paid under an illegal assessment or sale;³ to recover an illegal tax paid under protest;⁴ money paid by mistake;⁵ or under a misapprehension of facts, or where there has been a total failure of consideration;⁶ and money obtained through fraud and false representation;⁷ and against a common carrier for failing to deliver goods which he was employed to convey for the plaintiff.⁸

It lies on promises to pay or repay money, or to do or forbear some other act; as, for goods sold and delivered, for work and labor, use and occupation, for money lent or money paid, for money had and received, and on an account stated. It also lies for a breach of warranty, express or implied, in the sale or exchange of chattels, or the breach of a contract of bailment, or to recover for the labor of servants, or to recover the consideration money for land sold, on a promise to pay a debt barred by the statute of limitations, and for unpaid installments of a subscription to the stock of an incorporated company.⁹

Assumpsit lies against a husband or father for necessary supplies furnished to his wife or child, whom he is bound to support, and has refused or neglected to supply, notwithstanding

Harrison v. Coquillard, 26 Ill. App. 513; *Chemical Bank v. Bank of Portage*, 156 Ill. 149.

¹ *Serg. & Rawle*, 48; *Mayfield v. Moore*, 53 Ill. 428.

² *Ripley v. Gelston*, 9 Johns. 201.

³ *Bradford v. Chicago*, 25 Ill. 411; *Stephenson v. Manny*, 56 Ill. 160; *Sup. v. Springfield*, 63 Ill. 66.

⁴ *Falkner v. Hunt*, 16 Cal. 167; *Ford v. Holden*, 39 N. H. 143; *City v. Powell*, 2 Metc. (Ky.), 226; *Bank v. Mumford*, 4 R. I. 478.

⁵ *Trumbull v. Campbell*, 3 Gilm. 502; *Stempel v. Thomas*, 89 Ill. 146; *Wolf v. Beard*, 123 Ill. 585; *Bank v.*

Mitchell, 88 Ill. 52; *People v. Foster*, 133 Ill. 496; *Devine v. Edwards*, 101 Ill. 138; *Ass'n Co. v. Scammon*, 133 Ill. v. 627; *Bank v. Bartalott*, 11 Bradw. 620.

⁶ *Bradford v. Chicago*, 25 Ill. 411; *Raney v. Boyce*, 39 Ill. 24; *Town v. Wood*, 37 Ill. 512.

⁷ *Dana v. Kemble*, 17 Pick. 545; *Byrbie v. Wood*, 24 N. Y. 607; *Moses v. McFerlan*, 2 Burr 1012.

⁸ *Dowling v. Stewart*, 3 Scam. 193; *I. C. R. R. v. Johnson*, 34 Ill. 389.

⁹ 1 Wait's Ac. & Def. 378, and cases there cited.

ing his protestations against his liability;¹ and against an attorney for negligence in transacting the business of his profession.²

It lies for the value of goods which the defendant, by fraud, induced the plaintiff to sell to an insolvent person, and afterward obtained for his own benefit;³ upon an express promise to pay a debt upon a specialty, upon a new consideration, as for forbearance;⁴ and for a penalty forfeited upon a by-law.⁵

One who accepts a deed poll, requiring him to pay money, is liable in assumpsit, to pay such sum.⁶ Where there is no contract relation between the receiver of a telegram and the telegraph company transmitting the same, the former can not maintain assumpsit against the latter for a loss caused by a neglect to send the message correctly.⁷ It may be maintained by an officer selling property under execution, against an accepted purchaser for the amount of his bid.⁸ It will lie upon a judgment in condemnation proceedings, after possession has been taken of the property.⁹

Under section 19 of the present Practice Act, assumpsit may be maintained upon sealed instruments. That section has abolished the distinction between sealed and unsealed instruments.¹⁰ Money lost at gaming,¹¹ or betting on elections, horse racing and the like,¹² may be recovered in this action.

¹ *Hunt v. Thompson*, 3 Scam. 179; *Phillips v. Myers*, 82 Ill. 67; *Van Valkenburg v. Watson*, 13 Johns. 480

² *Church v. Mumford*, 11 Johns. 479; *Stimpson v. Sprague*, 6 Maine, 471; *Ellis v. Henry*, 5 J. J. Marsh. (Ky.) 248.

³ *Bonnell v. Chamberlin*, 26 Conn. 487.

⁴ *Knowlton v. Tilton*, 38 N. H. 257.

⁵ *Bavington v. R. R. Co.*, 34 Penn. 358.

⁶ *Schmidt v. Glade*, 126 Ill. 485; *Guild v. Leonard*, 18 Pick. 511; *Goodwin v. Gilbert*, 9 Mass. 510.

⁷ *W. U. T. Co. v. Dubois*, 128 Ill. 248.

⁸ *Webb v. Perkins*, 60 Ill. App. 91;

Freeman on Executions, Sec. 313 h; *Herman on Execution*, Sec. 211.

⁹ *City v. Hayward*, 60 Ill. App. 582.

¹⁰ *Ins. Co. v. Nelson*, 65 Ill. 415; *Ins. Co. v. Palmer*, 81 Ill. 88; *Daegling v. Schwartz*, 80 Ill. 320; *Edwards v. Dillon*, 147 Ill. 14; *Cemetery v. Weidenmann*, 139 Ill. 67.

¹¹ 1 Starr & Curtis' An. Stat. 792; *Tatman v. Strader*, 23 Ill. 493; *Doxey v. Miller*, 2 Bradw. 30; *Lockhart v. Hullinger*, 2 Bradw. 465; *Parmalee v. Rogers*, 26 Ill. 56; *Garrison v. McGregor*, 51 Ill. 473; *Petillon v. Hipple*, 90 Ill. 420.

¹² *Holland v. Swain*, 94 Ill. 154; *Mosher v. Griffin*, 51 Ill. 184; *Parmalee v. Rogers*, 26 Ill. 56.

Where a party performs labor under a special contract, and has been prevented by the act or default of the opposite party from completing it, he may recover for such labor in an action of assumpsit.¹ If one person converts the property of another into money or money's worth, the owner may waive the tort, and recover for money had and received for his use.²

Where a judgment has been reversed upon an appeal or writ of error, assumpsit may be maintained to recover money paid under it, or collected on execution.³ Where a broker employed to make sale of grain for future delivery, advances money to fill the contract, he may recover same in assumpsit.⁴ A surety, on the payment of the debt, may recover in assumpsit.⁵

Consideration of contract.—Every promise, for the non-performance of which an action of assumpsit may be maintained, must be founded upon a sufficient consideration. *Nudum pactum*, or an agreement to do or pay anything on one side, without any compensation on the other, is wholly void in law.⁶ If founded on an illegal consideration it is also void.⁷

But any act of the plaintiff from which the defendant derives a benefit or advantage, or any labor, detriment or in-

¹ *Butts v. Huntley*, 1 Scam. 410; *Selby v. Hutchinson*, 4 Gilm. 319; *Bannister v. Read*, 1 Gilm. 100; *Reed v. Phillips*, 4 Scam. 40; *Herrington v. Hubbard*, 1 Scam. 569; *Webster v. Enfield*, 5 Gilm. 298; *Lincoln v. Schwartz*, 70 Ill. 135; *Bishop v. Bauer*, 62 Ill. 188; *Cemetery v. Weidenmann*, 139 Ill. 67.

² *Dickinson v. Whitney*, 4 Gilm. 406; *Gray v. St. John*, 35 Ill. 222; *Statt v. Evans*, 35 Ill. 455; *Alderson v. Ennor*, 45 Ill. 128; *De Clerg v. Murgin*, 46 Ill. 112; *Creel v. Kirkham*, 47 Ill. 344; *Leonard v. Dunton*, 51 Ill. 482; *Ives v. Hartley*, 51 Ill. 520; *Parker v. Tiffany*, 52 Ill. 286; *McIntyre v. Thompson*, 14 Bradw. 554; *City of Elgin v. Joslyn*, 133 Ill. 525.

³ *McJilton v. Love*, 13 Ill. 486; *Clayes v. White*, 83 Ill. 540; *Field v. Anderson*, 103 Ill. 403; *McLagan v. Brown*, 11 Ill. 524; *Hays v. Cassell*, 70 Ill. 670; *Herman on Ex.* 608; *Freeman on Ex.*, § 347; *Freeman on Judgments*, §§ 482, 483.

⁴ *Perin v. Parker*, 126 Ill. 201.

⁵ *Junker v. Rush*, 136 Ill. 179.

⁶ *Merkle v. Werheim*, 32 Ill. 534; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Hennessey v. Hill*, 52 Ill. 281; *McLean v. McBean*, 74 Ill. 134; *Wilson v. Keller*, 9 Bradw. 347; *Greenman v. Greenman*, 107 Ill. 404.

⁷ *Henderson v. Palmer*, 71 Ill. 579; *Tenney v. Foote*, 95 Ill. 99; *Paton v. Stewart*, 78 Ill. 481; *Wolf v. Fletmeyer*, 83 Ill. 418; *R. R. Co. v. Mathers*, 104 Ill. 257.

convenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration if such act is performed or such inconvenience suffered by the plaintiff with the consent, either express or implied, of the defendant.¹

Privity of contract.—To maintain the action, there must be a privity between the parties, but it may be a *privity* in fact or in law.² If the plaintiff is a stranger to the consideration he can not maintain assumpsit.³ But a party may maintain an action on a promise made to a third party for his benefit.⁴

COMMENCEMENT OF AN ACTION OF ASSUMPSIT.

Form of præcipe for summons.

In the — Court of the County of —, in the State of Illinois.

A. B. }
vs. } *Assumpsit.* Damages \$—.
 C. D. }

The clerk of the said court will issue a summons in the above entitled cause, directed to the sheriff of the county of —, and returnable at the next — term, A. D. 18—.

Dated this — day of —, A. D. 18—.

E. F., Attorney for Plaintiff.

To — Esq.

Clerk of said Court.

DECLARATIONS IN ASSUMPSIT.

No. 24. Commencement and conclusion of a declaration in assumpsit.

In the — — Court.

— Term, A. D. 18—.

STATE OF ILLINOIS, }
 County of —, } ss.

A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of

¹ *Hulse v. Hulse*, 84 Eng. Com. Law R. 711; *Davis v. Nisbett*, 100 Id. 752; *Child v. Morley*, 8 Term R. 610.

² *Critzer v. McConnel*, 15 Ill. 172; *Trumbell v. Campbell*, 3 Gilm. 502; *Hall v. Carpen*, 27 Ill. 386; *Carpen v. Hall*, 29 Ill. 512; *Alderson v. Ennor*, 45 Ill. 128; *Allen v. Stenger*, 74 Ill. 119; *Bloomer v. Denman*, 12 Ill. 240;

W. U. T. Co. v. Dubois, 128 Ill. 248; *Neill v. Chesson*, 15 Bradw. 266; *Atterberry v. Jackson*, 15 Bradw. 27.

³ *Bloomer v. Denman*, 12 Ill. 240; *Cabot v. Haskins*, 3 Pick. 83.

⁴ *Bristow v. Lane*, 21 Ill. 194; *Ball v. Benjamin*, 56 Ill. 105; *Ins. Co. v. Olcott*, 97 Ill. 439; *Steel v. Clark*, 77 Ill. 471.

a plea of trespass on the case on promises; (*) for that, etc., (*insert declaring part and conclude*) to the damage of the plaintiff of — dollars; and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

(*Add copy of instrument, or account sued on.*)

It is the uniform practice to place the *ad damnum* at the end of the declaration, and then it applies to each of the counts which precede it. It is not necessary to add it to each count.¹

No. 25. *Indebitatus assumpsit.*

(This count may be used in any of the following cases, by inserting in the brackets the grounds of action.)

In the — Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of —, } sct. A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass on the case on promises: For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, was indebted to the plaintiff in the sum of — dollars, for (*) (*here state the subject-matter of the debt, as in the following counts, and proceed as follows:*) and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money, on request. Yet the defendant, though requested, has not paid the same, or any part thereof, to the plaintiff, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

I. *Goods sold and delivered.*

(*Insert in the brackets in form No. 25, after the (*), the following:*) “goods, chattels and effects before that time sold and delivered by the plaintiff to the defendant, at his request.”

II. *Goods bargained and sold.*

(*Insert in form No. 25:*) “goods, chattels and effects before that time bargained and sold by the plaintiff to the defendant, at his request.”

III. *Labor and services.*

(*Insert in form No. 25:*) “the labor and services of the plaintiff, by him before that time done and bestowed in and about the business of the defendant, at his request.”

IV. *Work and materials.*

(*Insert in form No. 25:*) “work before that time done, and materials for the same furnished, by the plaintiff for the defendant, at his request.”

¹ *R. R. Co. v. Wills*, 140 Ill. 614.

V. *Money lent.*

(*Insert in form No. 25 :*) “ money before that time lent by the plaintiff to the defendant, at his request.”

VI. *Money expended.*

(*Insert in form No. 25 :*) “ money before that time paid and expended by the plaintiff for the use of the defendant, at his request.”

VII. *Money received.*

(*Insert in form No. 25 :*) “ money before that time received by the defendant, for the use of the plaintiff.”

VIII. *Interest.*

(*Insert in form No. 25 :*) “ interest on divers sums of money before that time forborne by the plaintiff to the defendant, at his request, for the divers spaces of time before then elapsed.”

IX. *Account stated.*

(*Insert in form No. 25 :*) “ money found to be due from the defendant to the plaintiff, upon an account then and there stated between them.”

X. *Board and lodging.*

(*Insert in form No. 25 :*) “ the use and occupation of certain rooms and furniture of the plaintiff, before that time used and enjoyed by the defendant, at his request; and for meats, drinks and attendance, and other necessities and goods by the plaintiff before that time found and provided for the defendant, at his request.”

XI. *Hire of horses, etc.*

(*Insert in form No. 25 :*) “ the use and hire of horses, carriages and goods by the plaintiff before that time let to the defendant, at his request, and by him accordingly had and used.”

XII. *Stabling and keeping horses, etc.*

(*Insert in form No. 25 :*) “ horsemeat, stabling, care and attendance by the plaintiff before that time provided and bestowed in and about the feeding and keeping of divers horses, mares, geldings and cattle, for the defendant, at his request.”

XIII. *Necessaries.*

(*Insert in form No. 25 :*) “ meat, drink, washing, lodging, attendance and other necessities and goods before that time found and provided by the plaintiff for the defendant, at his request.”

XIV. *Physician's bill.*

(*Insert in form No. 25 :*) “ medical attendance, advice and medicines before that time given and provided by the plaintiff to and for the defendant, at his request.”

XV. *Attorney's bill.*

(*Insert in form No. 25:*) “the work, care, diligence, journeys and attendance of the plaintiff, by him before that time performed and bestowed, as the attorney and solicitor of and for the defendant, at his request, and for fees due to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work for the defendant, at his request.”

XVI. *Warehouse room, etc.*

(*Insert in form No. 25:*) “work done by the plaintiff, and warehouse room by him found and provided, in and about the stowing, keeping and taking care of certain goods before then stowed, kept and taken care of by the plaintiff, in certain warehouses and premises of the plaintiff, for the defendant, at his request.”

No. 26. *Common counts, consolidated.*

(*Commence as in No. 25, ante, page 76.*) For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, was indebted to the plaintiff in the sum of — dollars, for goods, chattels and effects before that time sold and delivered by the plaintiff to the defendant, at his request; and in the like sum for goods, chattels and effects before that time bargained and sold by the plaintiff to the defendant, at his request; and in the like sum for work and services before that time done and bestowed, and materials for the same work furnished, by the plaintiff for the defendant, at his request; and in the like sum for money before that time lent by the plaintiff to the defendant, at his request; and in the like sum for money before that time paid and expended by the plaintiff for the use of the defendant, at his request; and in the like sum for money before that time received by the defendant for the use of the plaintiff; and in the like sum for interest on divers sums of money before that time forborne by the plaintiff to the defendant, at his request, for divers spaces of time before then elapsed; and in the like sum for money found to be due from the defendant to the plaintiff, on an account then and there stated between them; and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him, on request, the several sums of money so due to him as aforesaid. (*) Yet the defendant, though requested, has not paid the same, or either of them, or any part thereof, to the plaintiff, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

No. 27. *Common counts condensed.*

(*Commence as in No. 25, ante, and then proceed:*) For that whereas, the defendant, at, etc., on etc., was indebted to the plaintiff in the sum of — dollars, for the price and value of goods then and there sold and delivered by the plaintiff to the defendant, at his request; and in the sum of — dollars, for the price and value of work then and there done

and materials for the same provided by the plaintiff for the defendant at his request; and in the sum of — dollars for money then and there lent by the plaintiff to the defendant, at his request; and in the sum of — dollars, for money then and there paid by the plaintiff for the use of the defendant at his request, and in the sum of — dollars for money then and there had and received by the defendant for the use of the plaintiff; and in the sum of — dollars, for money found to be due from the defendant to the plaintiff, on an account then and there stated between them; and in the sum of — dollars, for interest on divers sums of money then past due from the defendant to the plaintiff; and whereas, the defendant, afterward, on, etc., in consideration of the premises respectively, then and there promised to pay the said several sums of money, respectively, to the plaintiff on request, yet he has disregarded his promises and has not paid the said several sums of money, or any or either of them, or any part thereof, although often requested so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

(Add copy of account sued on.)

The joinder in one count of all the common counts has been in general practice in the English courts, and by most of those in the American states. The practice is not only sanctioned, but commended by the ablest jurists.¹

Where the declaration alleges a debt for work done, and a debt for goods sold, etc., though with only one general promise to pay, the statement of each debt is regarded as a separate count; but where there is only one statement of debt, though founded on several considerations, it is one count only.²

Several causes of action may be joined in one count, and it will not be necessary to prove all the causes alleged. Recovery may be had *pro tanto*.³ Under an *indebitatus* count the plaintiff may recover what may be due to him, although no specific price or sum was agreed upon; and therefore it has been observed that the *quantum meruit* and *quantum valebant* counts are unnecessary, and should in many cases be omitted, to prevent unnecessary prolixity and expense.⁴

A count for goods sold and delivered, which avers that a party promised to pay on request, the declaration concluding

¹ *Perdicaris v. Bridge Co.*, 5 Dutch. (N. J.) 367; *Bailey v. Freeman*, 4 Johns. 284.

² *Morse v. James*, 11 Meeson & Welsby, 831.

³ *Webber v. Tiville*, 2 Saund. 122; 2 Black 910; *Bailey v. Freeman*, 4 Johns. 284.

⁴ 1 Chit. Pl. 301; *Lumber Co. v. Jenks*, 20 Bradw. 369.

with the general breach of non-payment, is good, without averring a special request.¹

Where there is a subsisting unexecuted agreement, *indebitatus assumpsit* will not lie.² *Indebitatus assumpsit* will not lie where the agreement is not for the payment of money, but for the doing of some other thing; the count in such case must be special.³

It will lie to recover the stipulated price due on a special contract, where the contract has been completely executed, so that only a duty to pay the money remains.⁴ But it will not lie where the claim is upon a warranty of a chattel.⁵

The purchase money of land sold and conveyed may be recovered under the appropriate common count.⁶ A promissory note may be given in evidence under the money counts in an action by the indorsee against the maker,⁷ and in an action against the indorser;⁸ so may a check on a bank in which the drawer has no funds, in an action against the drawer, without showing presentment.⁹

A coupon is proper evidence under the common money counts.¹⁰ Bills of exchange,¹¹ and notes payable in specific

¹ *Walker v. Welch*, 13 Ill. 674.

² *Stollings v. Sappington*, 8 Mo. 118; *Chambers v. King*, 8 Mo. 517; *Wilt v. Ogden*, 13 Johns. 56; *Shepard v. Palmer*, 6 Conn. 100; *Cast v. Roff*, 26 Ill. 452.

³ *Perkins v. Hart*, 11 Wheat. 237; *Jewel v. Schroepfel*, 4 Cowen 564; *Wait v. Berry*, 12 Wend. 377; *Throop v. Sherwood*, 4 Gilm. 92; *Burnham v. Roberts*, 70 Ill. 19; *Myers v. Schemp*, 67 Ill. 469; *Rollins v. Duff*, 14 Bradw. 69.

⁴ *Lane v. Adams*, 19 Ill. 167; *Tunison v. Field*, 21 Ill. 108; *Eggleston v. Buck*, 24 Ill. 263; *Elrod v. Town*, 53 Ill. 369; *Thomas v. Caldwell*, 50 Ill. 138; *Adlard v. Muldoon*, 45 Ill. 193; *Pickard v. Bates*, 38 Ill. 40; *Elder v. Hood*, 38 Ill. 533; *Combs v. Steele*, 80 Ill. 101; *Fowler v. Deakman*, 84 Ill. 130; *Bank v. Hart*, 55

Ill. 62; *Bishop v. Bauer*, 62 Ill. 188; *Mayer v. Mitchell*, 59 Ill. App. 26; *Sands v. Potter*, 59 Ill. App. 206.

⁵ *Russell v. Gilmore*, 54 Ill. 147; *Burnham v. Roberts*, 70 Ill. 19.

⁶ *Elder v. Hood*, 38 Ill. 533.

⁷ *Bank v. Myer*, 7 Halst. 141; *Gilmore v. Nowland*, 26 Ill. 200; *Murchie v. Peck*, 57 Ill. App. 396.

⁸ *Hodges v. Holland*, 16 Pick. 395; *Bank v. Hurd*, 12 Mass. 172; *Ellsworth v. Brewer*, 11 Pick. 316; *Goodwin v. Morse*, 9 Met. (Mas.) 278; *Moore v. Moore*, 9 Met. (Mass.) 417.

⁹ *Cushing v. Gore*, 15 Mass. 69; *Ellis v. Wheeler*, 3 Pick. 18; *Ball v. Allen*, 15 Mass. 433; *Howes v. Austin*, 35 Ill. 396.

¹⁰ *Johnson v. Stark Co.*, 24 Ill. 75; *Supervisors v. Hubbard*, 45 Ill. 139.

¹¹ *R. R. Co. v. Neill*, 16 Ill. 269; *Brower v. Rupert*, 24 Ill. 183.

articles, are properly admissible under the money counts.¹ An action of assumpsit for work done can not be maintained without proof that such work was done at the request of the defendant, and for his benefit.² And in some cases, although the original agreement has not been strictly performed by the plaintiff, yet if the defendant avails himself of, and derives a benefit from, the work done, he will be liable upon a common count.³ The common counts can not be resorted to where there is a special contract, and the breach of the contract is the *gravamen* of the action. In such case the plaintiff must declare specially.⁴ But where the contract has been completely executed, so that only a duty to pay the money remains, a recovery may be had under the appropriate common counts, in *indebitatus* assumpsit.⁵ And in case of a part performance where the performance of the remaining provisions of the contract has been waived or prevented and the work performed has been accepted, a recovery may be had of the contract price for the services performed.⁶

Money had and received.—Under this count the plaintiff may prove the receipt of bank-notes by the defendant;⁷ or promissory notes;⁸ or credit in account, in the books of a third person;⁹ or a mortgage assigned to the defendant as collateral security, and under which he has acquired the prop-

¹ *Crandal v. Bradley*, 7 Wend. 311; *Pierce v. Crafts*, 12 Johns. 90.

² 1 Black. 247.

³ *Merrill v. R. R. Co.*, 16 Wend. 586; *Cemetery v. Weidenmann*, 139 Ill. 68; *Butts v. Huntley*, 1 Scam. 410; *Smith v. Lowell*, 8 Pick. 178; *Olmstead v. Beale*, 19 Pick. 528.

⁴ *Russell v. Gilmore*, 54 Ill. 147; *Rollins v. Duffy*, 14 Ill. App. 69.

⁵ *Throop v. Sherwood*, 4 Gilm. 92; *Lane v. Adams*, 19 Ill. 167; *Tunnicliffe v. Field*, 21 Ill. 109; *Holmes v. Stummel*, 24 Ill. 370; *Eggleston v. Buck*, 24 Ill. 262; *Walker v. Brown*, 28 Ill. 378; *Pickard v. Bates*, 38 Ill. 40; *Elder v. Hood*, 38 Ill. 533; *Adlard v. Muldoon*, 45 Ill. 193; *Russell v. Gilmore*, 54 Ill. 147; *Elrod v.*

Bernadotte, 53 Ill. 369; *Bank v. Hart*, 55 Ill. 62; *Combs v. Steel*, 80 Ill. 101; *Fowler v. Deakman*, 84 Ill. 130; *Bishop v. Bauer*, 62 Ill. 188; *Rollins v. Duffy*, 14 Ill. App. 69; *Cemetery v. Weidenmann*, 139 Ill. 67; *Preston v. Smith*, 156 Ill. 363; *Stewart v. Carbray*, 59 Ill. App. 397.

⁶ *Cemetery v. Weidenmann*, 139 Ill. 68; *City of Chicago v. Sexton*, 115 Ill. 230; *Bishop v. Bauer*, 62 Ill. 188.

⁷ *Pickard v. Banks*, 13 East 20; *Loundes v. Anderson*, 13 East 130; *Mason v. Waite*, 17 Mass. 560.

⁸ *Tuttle v. Mayo*, 7 Johns. 132; *Fairbanks v. Blackington*, 9 Pick. 93.

⁹ 3 Camp. 199.

erty;¹ and where money has been *delivered* to the defendant for a *particular purpose*, to which he has refused to apply it, he can not apply it to any other, but it may be recovered by the depositor, under the count for money had and received.² If it was placed in his hands to be paid over to a third person, which he agreed to do, such person, assenting thereto, may sue for it, as money had and received to his use;³ but if the defendant did not consent so to appropriate it, it is otherwise, there being no privity between them; and the action will lie only by him who placed the money in his hands.⁴ The count for money had and received may also be supported by evidence that the defendant obtained the plaintiff's money by fraud, or false color or pretense.⁵

And generally speaking, whenever one person has in his hands money equitably belonging to another, that other person may recover it in assumpsit under the count for money had and received;⁶ but the plaintiff must show a just as well as a legal right to the money.⁷ Assumpsit for money had and received lies to recover money paid on an execution issued on a judgment⁸ subsequently reversed.⁹ Where a contract is rescinded, assumpsit for money had and received will lie to recover money paid thereon.¹⁰ Assumpsit for money had and received lies to recover money paid under an original ignorance or a subsequent forgetfulness of facts.¹¹

An action for money due under a contract by which plaintiff

¹ *Gilechrist v. Cunningham*, 8 Wend. 641.

² *Williams v. Everett*, 14 East 582; *Parker v. Fisher*, 39 Ill. 164.

³ Com. Dig. 205, 206; *Parker v. Fisher*, 39 Ill. 164.

⁴ *Williams v. Everett*, 14 East 582; *Hall v. Marston*, 17 Mass. 575; *Neill v. Chessen*, 15 Ill. App. 266; *Maxwell v. Longnecker*, 82 Ill. 308.

⁵ 1 *Stephens' Nisi Prius*, 335; *Bliss v. Thompson*, 4 Mass. 488; *Lyon v. Annable*, 4 Conn. 350; *Drennan v. Bunn*, 124 Ill. 175.

⁶ *Hall v. Marston*, 17 Mass. 575; *Claylin v. Godfrey*, 21 Pick. 1; *Haw-*

ley v. Sage, 15 Conn. 52; *Taylor v. Taylor*, 20 Ill. 650; *McLain v. Watkins*, 43 Ill. 24.

⁷ 2 Burr 1012; Doug. 138; *Straton v. Rastall*, 2 T. R. 370.

⁸ *Wisner v. Bulkley*, 15 Wend. 321; *Rain v. Reynolds*, 18 Cal. 273.

⁹ *Sturges v. Allis*, 10 Wend. 354; *Maghee v. Kellogg*, 24 Wend. 32; *Clark v. Pinney*, 6 Cow. 297; *Stevens v. Fitch*, 11 Met. 248.

¹⁰ *Luey v. Bundy*, 9 N. H. 298; *Richards v. Allen*, 5 Shep. 296.

¹¹ *Kelly v. Solan*, 9 M. & W. 54; *Bank v. Ballard*, 7 How. (Miss.) 371.

iff conveyed land to the defendant with the agreement that he was to receive all over a certain amount, which defendant should receive when he should sell it, can be maintained under a declaration containing the common counts for money had and received.¹

Money paid by one to another, by a mutual mistake of facts in respect to which both were equally bound to inquire, may be recovered back in assumpsit, under the count for money had and received.² And under section 29, chapter 110, of the "Practice" act, such a demand may be set off by a defendant against the amount claimed to be due the plaintiff.³

Where money is paid by one party to another for a given article, assumed to be sold, but the seller delivers to the purchaser only a worthless imitation of that article, there is a legal fraud, and an action for money had and received will lie for the money thus paid, for which nothing has been received.⁴ Where money is paid under duress, it may be recovered as money received to the use of the person paying.⁵

An action for money had and received may be maintained for a share of the profits of a single joint enterprise, under an agreement that such profits should be equally divided, where the transaction is completed and the profits received by the defendants.⁶ The action for money had and received, lies for money accruing, due to the plaintiff, under the provisions of a statute where there is no restriction to any other particular remedy.⁷ A sub-contractor can not recover under the common counts for goods sold and delivered, or for money had and received.⁸

Money paid and expended.—Where one person pays the indebtedness of another at his request, an action will lie for

¹ *Knoblech v. Romeis*, 34 Ill. App. 577.

² *Wolf v. Beaird*, 123 Ill. 585.

³ *Assurance Co. v. Scammon*, 133 Ill. 627.

⁴ *Drennan v. Bunn*, 124 Ill. 175.

⁵ *Bradford v. Chicago*, 25 Ill. 411; *La Salle v. Simmon*, 5 Gilm. 513; *Falls v. Cairo*, 58 Ill. 403; *Harvey v. Olney*, 42 Ill. 336; *R. R. Co. v.*

Coal Co., 79 Ill. 121; *Pemberton v. Williams*, 87 Ill. 15; see *Elston v. Chicago*, 40 Ill. 514; *Stover v. Mitchell*, 45 Ill. 213; *Conkling v. City*, 132 Ill. 420.

⁶ *Gottschalk v. Smith*, 156 Ill. 377.

⁷ *Sangamon v. Springfield*, 63 Ill. 66.

⁸ *Ice Co. v. Murphy*, 59 Ill. App. 39.

money paid.¹ The action for money paid does not lie where there is no undertaking, express or implied, to pay.²

The general rule is that to sustain the count there must have been an actual payment upon request, or a payment with subsequent approval.³ Under certain circumstances, however, the law will imply both the request and promise, as where the plaintiff has been compelled to pay money that the defendant was legally bound to pay.⁴

Where several persons agree to contribute equally to certain expenditures and one advances more than his share, the excess is so much paid for the use of the others, and may be recovered with interest;⁵ and so when one of two joint purchasers is compelled to pay money for the other upon the joint indebtedness.⁶ A surety, on payment of the debt, will be entitled to an action against his principal upon an implied assumpsit.⁷

In case a broker, employed to make sale of grain for future delivery, advances money to buy the grain to fill the contract, such advance will be regarded as money advanced upon the implied request of the principal, and therefore may be recovered under the common counts.⁸

Work and materials—Quantum meruit.—In an action for work and labor, the plaintiff, in the absence of a price fixed by contract, is entitled to recover what his services were reasonably worth;⁹ and where one performs services upon a parol contract, which, being within the statute of frauds, can not be enforced, he may recover the value thereof upon a *quantum meruit*.¹⁰

Where work is done in expectation on both sides that it is to

¹ *Allen v. Breusing*, 32 Ill. 505; *R. Co. v. Fackney*, 78 Ill. 116.

² *Briscoe v. Powers*, 64 Ill. 72; *Durant v. Rogers*, 71 Ill. 121.

³ *Fowler v. Hall*, 7 Ill. App. 332; 2 Greenl. Ev., § 113.

⁴ *Jeffries v. Gurr*, 2 B. & Ad. 833; *Exall v. Partridge*, 8 T. R. 308; *Fowler v. Hall*, 7 Ill. App. 332; *Doty v. Wilson*, 14 Johns. 378; *Kenan v. Holloway*, 16 Ala. 54; *Hatch v. Purcell*, 1 Foster 544.

⁵ *Buckmaster v. Grundy*, 3 Gilm. 626.

⁶ *Harvey v. Drew*, 82 Ill. 606.

⁷ *Junker v. Rush*, 136 Ill. 179.

⁸ *Perin v. Parker*, 126 Ill. 201.

⁹ *Frazer v. Gregg*, 20 Ill. 299; *Lockwood v. Onion*, 56 Ill. 506; *R. Co. v. Wilcox*, 66 Ill. 417.

¹⁰ *Steel Works v. Atkinson*, 68 Ill. 421; *Folliott v. Hunt*, 21 Ill. 654.

be paid for, there may be a recovery upon an implied promise.¹ Where work is fully performed under a special agreement, but not precisely in accordance with the contract, there may be a recovery upon a *quantum meruit*.²

Where there is a sealed contract to perform particular work, and the contractor performs in part, but is prevented by the other party from completing it, the value of the work done and materials furnished by him under the contract must be fixed by its stipulations so far as they can be applied, and he can not proceed upon a *quantum meruit* in disregard of the contract.³ Where one erects a building for a county for which he receives bonds which are afterward repudiated by the county, the contract price may be recovered upon the common counts in assumpsit.⁴

No. 28. *Quantum meruit count.*

(Commence as in No. 25, ante, page 76.) For that whereas on the — day of —, in the year 18—, in the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had before that time done and bestowed certain work and services in and about the business of the defendant, and for him, (or insert any other subject-matter of debt, as in the forms under No. 25, ante, except goods sold and delivered, or goods bargained and sold, and proceed thus:) the defendant promised the plaintiff to pay him, on request, so much money as he therefor reasonably deserved to have; and the plaintiff avers that he then and there reasonably deserved to have therefor the sum of — dollars, whereof the defendant then and there had notice. Yet the defendant, though requested, has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 29. *Quantum valebant count.*

(First, indebitatus count, as ante, No. 25, page 76.) And whereas, also, on the day last aforesaid, in the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had before that time sold and delivered (or "bargained and sold," as the case may be,) to the defendant divers other goods, chattels and effects, the defendant promised the plaintiff to pay him, on request, so much money as the last-mentioned goods,

¹ *Byers v. Thompson*, 66 Ill. 421.

² *Taylor v. Renn*, 79 Ill. 181; *Eggleston v. Buck*, 24 Ill. 262.

³ *Chicago v. Sexton*, 115 Ill. 230; *Folliott v. Hunt*, 21 Ill. 654; *Evans*

v. R. R. Co., 26 Ill. 189; *Holmes v. Stummel*, 24 Ill. 370; *Dobbins v. Higgins*, 78 Ill. 440.

⁴ *Jackson Co. v. Hall*, 53 Ill. 440.

chattels and effects, at the time of the sale and delivery (or "bargain and sale") the eof as aforesaid, were reasonably worth; and the plaintiff avers that the same were then and there reasonably worth the further sum of — dollars, whereof the defendant, on the day last aforesaid, there had notice. Yet the defendant, though requested, has not paid to the plaintiff the last-mentioned sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

As the plaintiff may recover on the *indebitatus* count, though no contract for a specific price be proved, the *quantum meruit* or *quantum valebant* count seems necessary, and where the declaration is otherwise long, should be omitted.¹

The *quantum valebant* count is not in practice adopted, except when the demand is for goods sold and delivered, or bargained and sold, and the *quantum meruit* count seems in all cases sufficient.²

COMMON COUNTS—RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES OR THE DEFENDANT IS SUED.

No. 30. *By surviving partner, on promises to both partners.*

In the ——— Court.

—— Term, 18—.

STATE OF ILLINOIS, }

County of —, } sct. A. B., plaintiff, by G. H., his attorney, complains of C. D., defendant, of a plea of trespass on the case on promises: For that whereas the defendant, in the lifetime of one E. F., since deceased, to wit, on the — day of —, in the year 18—, in the county aforesaid, was indebted to the plaintiff and the said E. F. in the sum of — dollars, for the work and services of the plaintiff and the said E. F., by them before that time done and bestowed for the defendant, at his request (*any other demand, as "for goods sold," etc., is to be described in the same manner*), and being so indebted, the defendant, in consideration thereof, then and there promised, etc. (*laying the promise to both the partners*). Yet the defendant, though requested, has not paid the said sum of money, or any part thereof, to the plaintiff and the said E. F., or either of them, but refuses to pay the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

If deemed expedient, counts may be added on promises to the survivor. See forms of declarations by executors and administrators, *post*. The administrator of a deceased part-

¹ 2 Chit. Pl. 38, note a; *Webber v. Tivill*, 2 Saund. 122, note 2. ² 2 Chit. Pl. 38, note b.

ner should not join with the surviving partner in a suit to recover a debt due to the partnership.¹ It would be untechnical in a declaration merely to describe a deceased partner as a late partner, without averring his death.² But the omission of the words, "since deceased," in a declaration, is no ground for demurrer.³

No. 31. Against surviving partner, for work done.

In the ——— Court.

——— Term, 18—.

STATE OF ILLINOIS, }
County of ———, } sct. A. B., plaintiff, by G. H., his attorney, complains of C. D., defendant, of a plea of trespass on the case on promises: For that whereas the defendant and one E. F., in his lifetime, now deceased, on the ——— day of ———, in the year 18—, in the county aforesaid, were indebted to the plaintiff for work and services by the plaintiff before that time done and bestowed for the defendant and the said E. F., at their request (*or for any other matter, to be here inserted as in No. 25, ante, page 76*); and being so indebted, the defendant and the said E. F., in consideration thereof, then and there, in the lifetime of the said E. F., promised the plaintiff to pay him the said sum of money, on request. Yet though requested, the defendant and the said E. F. have not, nor has either of them, ever paid to the plaintiff the said sum of money, or any part thereof, but they in the lifetime of the said E. F. wholly refused, and the defendant has ever since the death of the said E. F. refused, and still refuses, so to do; to the damage, etc.

Where one of the joint makers of a contract dies, his executor or administrator is discharged, at law, and an action can be maintained only against the survivor.⁴ The survivor can not be sued jointly with the executor of the deceased.⁵

No. 32. Husband and wife against defendant for work, etc., by wife before marriage.

In the ——— Court.

——— Term, 18—.

STATE OF ILLINOIS, }
County of ———, } sct. A. B., and C., his wife, plaintiffs, by G. H., their attorney, complain of D. E., defendant, of a plea of trespass on the case on promises: For that whereas the defendant, while the said C. was sole and unmarried, to wit, on the ——— day of ———, in the year 18—, in the county aforesaid, was indebted to the said C. in the sum of ——— dollars, for work and services by her before that time done and bestowed in and

¹ *Belton v. Fisher*, 44 Ill. 32.

⁴ *Ballance v. Samuel*, 3 Scam. 380.

² ——— v. ———, 1 Har. & Wal. 108.

Conover v. Hill, 76 Ill. 342.

⁵ 1 Chit. Pl. 50; *Eggleston v. Buck*,

³ *Large v. Attwood*, 3 Dowl. 551.

31 Ill. 254.

about the business of the defendant, and for him, at his request (*or insert any other subject-matter of debt, as in the forms under No. 25, ante*); and being so indebted, the defendant, in consideration thereof, then and there, while the said C. was sole and unmarried as aforesaid, promised the said C. to pay her the said sum of money, on request. Yet the defendant, though requested, has not paid the said sum of money, or any part thereof, either to the said C. while she was sole and unmarried as aforesaid, or to the plaintiffs, or either of them, since their intermarriage, but refuses to pay the same; to the damage of the plaintiffs of — dollars, and therefore they bring their suit, etc.

Whenever a wife joins in a suit with her husband, her interest must appear.¹ In Illinois, since the passage of the act of February 21, 1861, entitled "*An act to protect married women in their separate property*," a *feme covert* may sue alone for her separate property, or for the enforcing of any of her rights, without joining her husband. So far as her separate property is concerned, she is unmarried, and she may institute suits even against her husband, should he, contrary to her wishes, and in contempt of her rights, unlawfully interfere.² Such is the law also in Pennsylvania, and several other states.³

At common law, for choses in action due to the wife before marriage, the husband and wife must join.⁴ It is well settled that the husband can not sue alone upon a contract of the wife when sole, and before marriage.⁵ They must join in all actions upon bonds, and other personal contracts, made with the wife before marriage, whether the breach was before or during the coverture.⁶

No. 33. *Against husband and wife, for work done, etc., for wife, before marriage.*

In the ——— Court.

—— Term, 18——.

STATE OF ILLINOIS, }
County of ———, } sct. A. B., plaintiff, by G. H., his attorney, complains
of C. D., and E., his wife, of a plea of trespass on the

¹ *Ballance v. Samuel*, 3 Scam. 383.

³ *Goodyear v. Rumbaugh*, 13 Penn.

² Rev. Stat. (1893), 806; Rev. Stat. (1895), 855; Starr & Curtis, 1269; *Emerson v. Clayton*, 32 Ill. 493; *R. Co. v. Dunn*, 52 Ill. 260; *Beach v. Miller*, 51 Ill. 206; *Burger v. Belsley*, 45 Ill. 72; *Chestnut v. Chestnut*, 77 Ill. 346; *Chicago v. McGraw*, 75 Ill. 566.

480; *Sheidle v. Weishlee*, 16 Penn. 134; *Gilliard v. Chesney*, 13 Texas 337.

⁴ 10 Pick. 463.

⁵ *Decker v. Livingston*, 15 Johns. 479; *Angel v. Felton*, 8 Johns. 150.

⁶ 1 Chit. Pl. 29; *Decker v. Livingston*, 15 Johns. 479.

case on promises: For that whereas the said E., while she was sole and unmarried, to wit, on the — day of —, in the year 18—, in the county aforesaid, was indebted to the plaintiff in the sum of —, for work before that time done, and materials for the same furnished, by the plaintiff for the said E., at her request (*or insert any other subject-matter of debt, as in the forms under No. 25, ante*); and being so indebted, she, the said E., in consideration thereof, then and there, while she was sole and unmarried as aforesaid, promised the plaintiff to pay him the said sum of money, on request. Yet neither has the said E., while she was sole and unmarried as aforesaid, nor have the defendants since their intermarriage, nor has either of them, ever paid to the plaintiff the said sum of money, or any part thereof, although thereto requested, but to pay the same the defendants refuse; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

In general, a *feme covert* can not be sued alone at common law; and when a *feme sole*, who has entered into a contract, marries, the husband and wife must in general be jointly sued.¹ But if a *feme sole* marries pending a suit against her, the marriage need not be noticed in the subsequent proceedings. It does not affect the form of the proceedings, but the suit goes on as if no marriage had taken place.²

A wife can not be sued at law on a note executed by herself and husband for land conveyed to the wife.³

No. 34. *By executor, for work, etc., on promise to testator.*

In the — — Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of —, } sct. A. B., plaintiff, executor of the last will and testament of E. F., deceased, complains of C. D., defendant,

of a plea of trespass on the case on promises. For that, whereas, the defendant, in the lifetime of the said E. F., to wit, on the — day of —, in the year 18—, in the county aforesaid, was indebted to the said E. F. in the sum of — dollars, for work before that time done, and materials for the same furnished by the said E. F. for the defendant, at his request (*any other debt, as for goods sold, etc., is to be described in the same manner*); and being so indebted, the defendant, in consideration thereof, then and there promised the said E. F. to pay him the said sum of money on request. Yet the defendant, though requested, has not paid the said sum of money, or any part thereof, either to the said E. F. in his lifetime, or to the plaintiff since the death of the said E. F., but refuses to pay the same; to the damage of the plaintiff, as executor as aforesaid, of — dollars, and therefore he brings his suit, etc.

¹ Chit. Pl. 57; *Angel v. Felton*, 8 Johns. 149.

² *Roosevelt v. Dale*, 2 Cow. 581.

³ *Carpenter v. Mitchell*, 50 Ill. 470.

And the plaintiff brings into the court here the letters testamentary to him granted, whereby it fully appears to the court here that the plaintiff is executor of the said last will and testament of the said E. F., deceased, and has the execution thereof, etc.

Where the plaintiffs added *profert* of letters testamentary in the following words, it was held sufficient: "And the said plaintiffs bring into court here the letters showing their qualifications as executors."¹

No. 35. Additional count on promise to the plaintiff as executor.

(First count as in No. 34, above.) And whereas also the defendant, in the lifetime of the said E. F., deceased, to wit, on the day first aforesaid, in the county aforesaid, was indebted to the said E. F. in the further sum of — dollars. for other work before that time done, and materials for the same furnished by the said E. F. for the defendant, at his request (*any other debt as "for other goods," etc., is to be described in like manner*); and being so indebted, and the last mentioned sum of money being wholly unpaid, the defendant, in consideration thereof, after the death of the said E. F., to wit, on the — day of —, in the year 18—, there promised the plaintiff, as executor as aforesaid, to pay him that sum of money, on request. Yet the defendant, though requested, has not paid the same, or any part thereof, to the plaintiff, but refuses so to do; to the damage, etc.

(Add *profert*, as in last precedent.)

The *ad damnum* and *profert* are only to be once inserted, at the conclusion of the declaration.²

No. 35a. By an administrator, on promise to the intestate.

In the — — Court.

— Term, 18—.

STATE OF ILLINOIS, }
County of —, } set.

A. B., plaintiff, administrator of the estate of E. F., deceased, who died intestate, complains of C. D., defendant, of a plea of trespass on the case on promises: For that whereas (*proceed as in count by executor, No. 34, ante, laying the damage to the plaintiff "as administrator as aforesaid," and add profert, thus:*)

And the plaintiff brings into the court here the letters of administration to him granted by the county court of the county of —, in the state aforesaid (*or whatever court or authority granted them*), which give sufficient evidence to the court here of the grant of administration of the said estate to the plaintiff, etc.

¹ *Linder v. Monroe*, 33 Ill. 388.

² *Emerson v. Clayton*, 32 Ill. 493;
R. Co. v. Wills, 39 Ill. App. 655.

If deemed advisable, add a count on promises to the administrator, as in the case of an executor, No. 35, *ante*. Where the declaration contains several counts, proceed in each only to the *ad damnum*, which is to be stated at the conclusion, in a separate paragraph, as follows:

To the damage of the plaintiff, as administrator as aforesaid, of — dollars, and therefore he brings his suit, etc.

(*Add profert.*)

SPECIAL COUNTS.

No. 36. *On promissory note—Payee against maker.*

In the ——— Court.

—— Term, 18—.

STATE OF ILLINOIS, }
County of ———, } *sect.* A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass on the case on promises: For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, made his promissory note, and delivered the same to the plaintiff, and thereby then and there promised to pay to the plaintiff, — after the date thereof, the sum of — dollars, for value received; by means whereof the defendant then and there became liable to pay to the plaintiff the said sum of money in the said note specified, according to the tenor and effect thereof; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money, according to the tenor and effect of the said note. Yet, although the day of payment in the said note specified has elapsed, the defendant has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 37. *On promissory note—Payee against maker.*

In the ——— Court.

—— Term, 18—.

STATE OF ILLINOIS, }
County of ———, } *sect.* A. B., plaintiff, by F. F., his attorney, complains of C. D., defendant, of a plea of trespass on the case on promises: For that, whereas, the defendant, on the — day of —, in the year 18—, in the county aforesaid, made his promissory note, and delivered the same to the plaintiff, and thereby then and there (*by the name of ———*) promised to pay, *on or before the — day of — next after the date thereof, to the order of the plaintiff (styling him ———), at the ——— Bank, in —, the sum of — dollars, for value received, with interest on the said sum, from the date of the said note, at the rate of — per centum per annum;* by means whereof the defendant then and there, *to wit, at the time and place first aforesaid,* became liable to pay

to the plaintiff the amount of the said note, according to the tenor and effect thereof; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said amount, according to the tenor and effect of the said note.

(The words in italics are to be inserted or not, or varied, as the case may require. Add common counts on the consideration for which the note was given and the common money counts, interest, and account stated, laying the day in all the common counts after the maturity of the note, and generally very recently. The consolidated common counts, as in No. 26, ante, as far as the () may be used. Conclude with a general breach, as follows:)*

Yet although the day of payment in the said note specified has elapsed, the defendant has not paid to the plaintiff the amount of the said note, or any part thereof, but refuses so to do; nor has the defendant, though requested, paid to the plaintiff the several other sums of money above specified, or any or either of them, or any part thereof, but refuses to pay him the same; to the damage of the plaintiff of ——— dollars, and therefore he brings his suit, etc.

A variance between the note described in the special count and the note offered in evidence, as to date, or otherwise, would at common law be fatal. But if the execution of the note is proved, the note can be offered in evidence under common counts.¹

In declaring on a promissory note, it should be described as it really is; if any omission is made of any of the conditions or contingencies upon which a note is payable, there will be a variance.

*No. 38. On promissory note—Payee against maker.
[Oliver's Precedents, 195.]*

(Commence as in No. 37, ante.) For that the defendant, on the — day of —, in the year 18—, in the county aforesaid, by his promissory note of that date, for value received, promised the plaintiff to pay him *or his order* the sum of — dollars, — after the said date, *with interest on the said sum, from that date, at the rate of — per centum per annum.* Yet, though requested, etc.

It is better to add the common counts in suits upon promissory notes, bills of exchange and other instruments of writing for the payment of money, so as to enable the plaintiff to in-

¹ *Nickerson v. Sheldon*, 33 Ill. 372; *berger v. Scott*, 88 Ill. 477; *Childs v. Streeter v. Streeter*, 43 Ill. 155; *Box-Fischer*, 52 Ill. 205.

If the note is payable at a particular place, it must be so averred in the declaration;² the omission would cause a variance.³ Where a cause of action depends upon the happening of an uncertain event, the declaration must aver the happening of such event.⁴

(Commence as in No. 36, ante, page 91.) For that whereas the defendants, on, etc., in, etc., made their six promissory notes, the date whereof is the day and year aforesaid, by one of which said promissory notes the defendants, on or before the 18th day of May then next, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon at the rate of ten per centum per annum after the same should become due; and by another of the said promissory notes, the defendants, on or before the said 18th day of May, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon, at the rate of ten per centum per annum, from the said 18th day of May; and by another of the said promissory notes, the defendants, on or before the said 18th day of May, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon, at the rate of ten per centum per annum, after the said note should become due; and by another of the said promissory notes, the defendants, on or before the said 18th day of May, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon at the rate of ten per centum per annum, from the said 18th day of May; and by another of the said promissory notes, the defendants, on or before the said 18th day of May, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon at the rate of ten per centum per annum, from the said 18th day of May; and by another of the said promissory notes, the defendants, on or before the said 18th day of May, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon at the rate of ten per centum per annum, from the said 18th day of May; and by another of the said promissory notes, the defendants, on or before the said 18th day of May, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon at the rate of ten per centum per annum, from the said 18th day of May; and by another of the said promissory notes, the defendants, on or before the said 18th day of May, promised to pay to the order of the plaintiff one thousand dollars, for value received, with interest thereon at the rate of ten per centum per annum, from the said 18th day of May. Yet the defendants have not paid to the plaintiff the amount of the said several

⁴ *Williams v. Smith*, 3 Scam. 524.

promissory notes, or of any or either of them, or any part thereof, but refuse so to do; to the damage of the plaintiff of ten thousand dollars, and therefore he brings his suit, etc.

The defendants demurred to a declaration substantially in the above form, in the circuit court of Madison county, at the August term, 1837; the demurrer was overruled, and the cause taken to the supreme court, where the decision of the court below was affirmed. The declaration was decided to be good in form and in substance. The court, in the opinion, says that "there is no misdescription, no incongruity or want of accuracy or certainty in the count." In our system of practice, it is of infinite importance to introduce precision and conciseness; and whatever tends to dispense with prolixity and useless recapitulation should be encouraged.¹

In Chitty on Pleading, it is laid down that several distinct debts or contracts may be included in one count, and the plaintiff will succeed *pro tanto*, though he only proves one of such contracts; for if the defendant is indebted for any one cause, it is a sufficient consideration for the promise (which the law raises) of the defendant to pay the money.²

No. 40. On promissory note—Indorsee against maker.

(Commence as in No. 37, ante.) For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, made his promissory note, and delivered the same to one G. H., and thereby then and there (*by the name of — —*) promised to pay, — — after the date thereof to the order of the said G. H., (*styling him — —*), at the — — Bank in —, the sum of — dollars, for value received, with interest on the said sum, from the date of the said note, at the rate of — per centum per annum; and the said G. H. thereupon then and there, to wit, at the time and place first aforesaid, assigned the said note, by indorsement thereon under his hand, to one I. J., who thereupon then and there assigned the same, by indorsement thereon under his hand, to the plaintiff; by means whereof the defendant then and there became liable to pay to the plaintiff the amount of the said note, according to the tenor and effect thereof; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said amount, according to the tenor and effect of the said note.

(The words in italics are to be used or not, or varied, according to the re-

¹ *Godfrey v. Buckmaster*, 1 Scam. 447; *Nelson v. Swan*, 13 Johns. 484; *Bailey v. Freeman*, 4 Johns. 284; *Johnson v. Stark Co.*, 24 Ill. 75.

² 1 Chit. Pl. 301.

quirements of the case. Add the money counts, interest, and account stated, and general breach, as follows. As there is no privity of contract between indorsee and maker, it is not usual to add any other common counts.)

And whereas also the defendant, on the — day of —, in the year 18—, in the county aforesaid, was indebted to the plaintiff in the sum of — dollars, for money before that time lent by the plaintiff to the defendant, at his request; and in the like sum for money before that time paid and expended by the plaintiff for the use of the defendant, at his request; and in the like sum for money before that time received by the defendant for the use of the plaintiff; and in the like sum for interest on divers sums of money before that time forborne by the plaintiff to the defendant, at his request, for divers spaces of time before then elapsed; and in the like sum for money found to be due from the defendant to the plaintiff, on an account then and there stated between them; and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him, on request, the several sums of money so due to him as aforesaid.

Yet although the day of payment in the said note specified has elapsed, the defendant has not paid to the plaintiff the amount of the said note, or any part thereof, but refuses so to do; nor has the defendant, though requested, paid to the plaintiff the several other sums of money above specified, or any or either of them or any part thereof, but refuses to pay him the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The allegation in the above precedent, "assigned the said note, by indorsement thereon under his hand," conforms to the statute of Illinois.¹ "Indorsed and delivered the said note," is, however, a sufficient averment.² It has been held that a remote indorsee may declare as the *immediate indorsee* of the first indorser, or of any intermediate indorser—striking out on the trial the indorsements not stated;³ but it would seem that if the plaintiff wished to take the benefit of any intermediate indorser's title, this indorsement must be averred.⁴ A note made payable to the order of the maker, becomes, by his indorsement and delivery, like a note made to the order of any other person.⁵

¹ Rev. Stat. (1893), 993; Rev. Stat. (1895), 1061; 2 Starr & Curtis 1654; Coal Co. v. Lickiss, 72 Ill. 521.

² Chitty's Pl. 127.

³ Chitty on Bills, 518; Bayley on Bills, 114; Best v. Bank, 76 Ill. 608. See Porter v. Cushman, 19 Ill. 572; Steinfeld v. Taylor, 51 Ill. App. 399.

⁴ 1 Gale 198.

⁵ Hall v. Burton, 29 Ill. 321; McAuliff v. Reuter, 61 Ill. App. 32; Bank v. Nordgren, 57 Ill. App. 346; Whitford v. Herting, 60 Ill. App. 413.

No. 41. Indorsee of an executor against maker.

(Commence as in No. 37, ante, page 91.) For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, made his promissory note, and delivered the same to one E. F., and thereby then and there promised to pay, — — after the date thereof, to the said E. F., or his order, the sum of — dollars, for value received, *with interest thereon, etc.*; and the said E. F. thereupon, on the day *first* aforesaid, there assigned the said note, by indorsement thereon under his hand, to one G. H., since deceased: And the plaintiff avers that on, etc., the said G. H. there made his last will and testament in writing, and thereby then and there appointed one J. K. executor thereof; and afterward, to wit, on, etc., the said G. H. there died: and thereupon the said J. K., on, etc., there duly proved the said last will and testament, and took upon himself the execution thereof; and the said J. K., so being such executor, afterward, to wit, on the day last aforesaid, as such executor as aforesaid, there assigned the said note, by indorsement thereon under his hand, to the plaintiff: By means whereof, etc.

(State liability and promise, and add money counts, etc., and breach, as in last precedent.)

An administrator or executor, or one of several executors, may indorse a promissory note payable to the intestate, or testator, so as to vest the legal interest in the assignee.¹

No. 42. Surviving partner or payee against surviving partner or maker, on promissory note.

In the — — Court.

— Term, 18—.

STATE OF ILLINOIS, }
County of —, } sct.

A. B., plaintiff, by J. K., his attorney, complains of E. F., defendant, of a plea of trespass on the case on promises: For that whereas in the lifetime of one C. D. and of one G. H., both since deceased, to wit, on the — day of —, in the year 18—, in the county aforesaid, the defendant and the said G. H. made their promissory note (*by the name and style of E. F. & Co.*) and delivered the same to the plaintiff and the said C. D., and thereby then and there promised to pay — after the date thereof, to the plaintiff and the said C. D., (*styling them by the name and style of A. B. & Co.*) or their order, the sum of — dollars, for value received, *with interest thereon, etc.*: by means whereof the defendant and the said G. H. then and there, *to wit, at the time and place first aforesaid*, became liable to pay to the plaintiff and the said C. D. the amount of the said note, according to the tenor and effect thereof; and being so liable, the defendant and the said G. H., in

¹ *Makepeace v. Moore*, 5 Gilm. 474; *Newell*, 15 Ill. 333; *Walker v. Craig*, Williams on Ex. 796; *Valentine v. Jackson*, 9 Wend. 302; *Dwight v.* 18 Ill. 116.

consideration thereof, then and there promised the plaintiff and the said C. D. to pay them the said amount, according to the tenor and effect of the said note.

(*Second count.*) And whereas also afterward, in the lifetime of the said C. D. and G. H., both since deceased, to wit, on, etc., in, etc., the defendant and the said G. H. were indebted to the plaintiff and the said C. D. in the sum of, etc. (*Proceed with the money counts, interest, and account stated; and conclude with the general breach, as follows:*

Yet although the day of payment in the said note specified has elapsed, the defendant and the said G. H. have not, nor has either of them, ever paid to the plaintiff and the said C. D., or either of them, the amount of the said note, or any part thereof; nor have the defendant and the said G. H., though thereto requested, nor has either of them, ever paid to the plaintiff and the said C. D., or either of them, the several other sums of money above specified, or any or either of them, or any part thereof; but the defendant and the said G. H. in his lifetime refused, and the defendant has ever since the death of the said G. H. refused, and still refuses, to pay the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

It seems it is not necessary to declare against a surviving partner *as such*; he may be sued as having contracted alone, without noticing the deceased.¹

No. 43. Executor of payee against maker, on promissory note.

(*Commence as in No. 34, ante, page 89.*) For that whereas in the lifetime of the said E. F., to wit, on the — day of —, in the year 18—, in the county aforesaid, the defendant made his promissory note, and delivered the same to the said E. F., and thereby then and there promised to pay, — months after the date thereof, to the said E. F., or his order, the sum of — dollars, for value received, *with interest thereon, etc.*, by means whereof the defendant then and there, *to wit, at the time and place first aforesaid*, became liable to pay to the said E. F. the said sum of money in the said promissory note specified, according to the tenor and effect thereof; and being so liable, the defendant, in consideration thereof, then and there promised the said E. F. to pay him the said sum of money, according to the tenor and effect of the said note.

(*Add money counts, etc., laying the promises to the deceased, and conclude with the breach, as follows:*)

Yet although the day of payment in the said note specified has elapsed, the defendant has not paid the amount of the said note, or any part thereof, either to the said E. F. in his lifetime, or to the plaintiff since the death of the said E. F.; nor has the defendant, though thereto requested, paid the

¹ 1 Chit. Pl. 40; *Goelet v. McKins-Bank*, 1 Har. & Gill., 231; 2 Chit. try. 1 Johns. Cases, 405; *Raborg v. Rep.* 406.

several other sums of money above specified, or any or either of them, or any part thereof, either to the said E. F. in his lifetime, or to the plaintiff since the death of the said E. F.; but to pay the same the defendant refuses, to the damage of the plaintiff, as executor, etc.

(Add proferet, as in No. 34, ante, page 89.)

No. 44. *Administrator of payee against maker, on promissory note.*

(Commence as in No. 35a, ante, page 90.) For that whereas heretofore, in the lifetime of the said E. F., to wit, on, etc., in, etc., the defendant made his promissory note, and delivered the same to the said E. F., and thereby then and there promised to pay, — after the date thereof, to the said E. F., or his order, the sum of — dollars, for value received, *with interest thereon, etc.*: by means whereof the defendant then and there, *to wit, at the time and place first aforesaid*, became liable to pay to the said E. F. the said sum of money in the said promissory note specified, according to the tenor and effect thereof; and being so liable, the defendant, in consideration thereof, then and there promised the said E. F. to pay him the said sum of money, according to the tenor and effect of the said note.

(Add money counts, etc., laying the promises to the deceased, and breach, as in last precedent, and proferet as in No. 35a, ante, page 90.)

No. 45. *Partners, payees, against partners, makers, on promissory note.*

In the ——— Court.

—— Term, 18——.

STATE OF ILLINOIS, }
County of ———, { sct. A. B., C. D. and E. F., (*partners under the name and style of A. B. & Co.*) plaintiffs, by ———, their attorney, complain of G. H., O. K. and P. T., (*partners under the name and style of G. H. & Co.*) defendants, of a plea of trespass on the case, on promises: For that whereas the defendants, on, etc., in, etc., made their promissory note (by the *said* name and style of G. H. & Co.) and thereby then and there promised to pay to the plaintiffs, (styling them by the *said* name and style of A. B. & Co.) — months after the date thereof, the sum of — dollars, for value received, with interest thereon, etc.: by means whereof, etc.

(State liability and promise, and add common counts, etc., and general breach, as in No. 37, ante.)

In a declaration by or against partners, it seems it is unnecessary to describe them as such,¹ and that part of the above form which is in italics might be omitted. It is well, however, to state how the parties to a note or other instrument are therein described.

¹ Swan's Pr. 303, note a.

No. 46. Payee against husband and wife, on note given by wife while sole.
[2 Chit. Pl. 136.]

(Commence as in No. 33, ante, page 88.) For that whereas the said E. heretofore, and while she was sole and unmarried, to wit, on, etc., at, etc., made her certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay (*two*) months after the date thereof, to the plaintiff, or order, the sum of — dollars, for value received, and then and there delivered the said promissory note to the plaintiff; by means whereof the said E. then and there became liable to pay to the plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, she, the said E., in consideration thereof, afterward, and while she was sole and unmarried, to wit, on the day and year aforesaid, at, etc., aforesaid, promised the plaintiff to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

(Add money counts, etc., and breach. See No. 33 ante, page 88.)

No. 47. Indorsee against indorser of a promissory note, alleging institution and prosecution of suit against maker.

(Commence as in No. 37, ante, page 91.) For that whereas one E. F., on, etc., in, etc., made his promissory note, and delivered the same to the defendant, and thereby then and there promised to pay, — — after the date thereof, to the defendant, or his order, the sum of — dollars, for value received, *with interest thereon, etc.*; and thereupon the defendant, on the day *first* aforesaid, there indorsed and delivered the said note to the plaintiff: And although on, etc., the said note became due, the said E. F. did not nor would then, or before or since that time, pay to the plaintiff the amount of said note, or any part of the same. And the plaintiff avers, that thereupon, on, etc., he impleaded the said E. F. in a plea of trespass on the case, on the said note, in the — court of the *said* county of —, (where the said E. F. then resided,) to the — term of that court, in the same year; and such proceedings were thereupon had in that plea, that in the same term, to wit, on, etc., by the consideration of the same court, the plaintiff recovered against the said E. F. the sum of — dollars, damages, as well as the costs of the plaintiff by him about his suit in that behalf expended, whereof the said E. F. was convicted; and the said judgment being in full force, and the said damages and costs remaining wholly unpaid, the plaintiff, on, etc., for obtaining satisfaction thereof, sued out of the same court a writ of *fiery facias*, directed to the sheriff of the said county of —, by which said writ the People of the said State of Illinois commanded the said sheriff that of the goods and chattels, lands and tenements, in his county, of the said E. F., the said sheriff should cause to be made the damages aforesaid, and the sum of — dollars, the costs aforesaid, together with interest thereon at the rate of six per centum per annum from the time of recovering the same as aforesaid, and also the further sum of — —, accruing costs on the said judgment, and that the said sheriff should have those moneys ready to render to the plaintiff, according to law, and should

make return of the said writ in ninety days after the date thereof; which said writ, on the day last aforesaid, was there delivered to the said sheriff to be executed; and on the return day of the said writ, to wit, on, etc., the said sheriff returned to the same court upon the said writ to the effect that in his county the said E. F. had not any goods or chattels, lands or tenements, whereof he, the said sheriff, could cause to be made the damages and costs aforesaid, or any part thereof: And so the plaintiff says, that before the commencement of this suit he used due diligence, by the institution and prosecution of a suit against the said E. F., to make of the said E. F. the amount of the said note, but without avail. By means whereof the defendant, on the day last aforesaid, having notice of the premises, there became liable to pay to the plaintiff, on request, the amount of the said note, and the costs aforesaid; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said amount, and the costs aforesaid, on request. Yet the defendant, though requested, has not paid the same, or any part thereof, to the plaintiff, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

(Form No. 48, following, may be adapted and used as a second count.)

Under the law merchant, the indorsement of a note amounts to a contract on the part of the indorser, that if, when duly presented, the note is not paid by the maker, the indorser will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder. An indorser may, by the form of his indorsement, make himself absolutely and positively, in all events, liable for the payment of the note, with or without due presentment or due notice of non-payment. If there is an agreement, in writing, to dispense with any demand upon the maker, or with notice of dishonor, the language will be construed to import an absolute dispensation with the ordinary conditions of an indorsement, and the indorser will become as absolutely bound to pay the same, when due, as if a guarantor or surety.¹

As a general rule, the name of the payee, appearing on the back of a promissory note, is evidence that he is indorser, and proves that he has assumed the liability of an indorser, as fully as if the agreement were written out in words.² An indorser of a note, although "without recourse," will be liable to the indorsee or holder, on the implied warranty that the

¹ *Dunnigan v. Stevens*, 122 Ill. 396.

² *Johnson v. Glover*, 121 Ill. 283.

note is a valid obligation for the amount expressed upon its face.¹

An indorsement without date is presumed to have been made at the date of the note; but this presumption may be rebutted.² The assignee is not bound to give the assignor notice of non-payment. Presentment of the note to the maker at maturity, and notice to the assignor of non-payment, will not, under the statute of Illinois, give a right of action against the latter.³

A guaranty of a note, by the payee or assignee, operates also as an assignment;⁴ and if an unauthorized guaranty is written over an assignor's signature, the contract of assignment is not thereby invalidated or affected.⁵ In an action by an assignee against an assignor, it is not competent for the latter to prove a verbal agreement made at the time of the indorsement of the note, to the effect that he should not be liable as indorser.⁶ But where the payee of a note sold and delivered it after it became due, and some time afterward indorsed it, without consideration, and solely for the purpose of enabling the indorsee to sue thereon in his own name, and with the express agreement that the indorser should not be liable by reason of his indorsement, it was held that such indorser was not liable in an action by remote indorseees of the note.⁷

The indorser is liable according to the law of the place of indorsement,⁸ unless the indorsement specially provides that his liability is to be governed by the law of some other state.⁹

¹ *Drennan v. Bunn*, 124 Ill. 175; Daniel on Negotiable Instruments, Vol. 1, Sec. 670; Parsons on Bills and Notes, p. 89.

² *White v. Weaver*, 41 Ill. 409; *Dupuy v. Schuyler*, 45 Ill. 306; *Richards v. Betzer*, 53 Ill. 466; *Clarke v. Johnson*, 54 Ill. 296; *Smith v. Nevlin*, 89 Ill. 193; *Hearson v. Graudine*, 87 Ill. 115; *Cisne v. Chidester*, 85 Ill. 523.

³ *Bank v. Hawley*, 1 Scam. 580; *Hilborn v. Arties*, 3 Scam. 344; *Pierce v. Short*, 14 Ill. 144.

⁴ *Heaton v. Hulbert*, 3 Scam. 491; *Judson v. Gookwin*, 37 Ill. 286; *Childs v. Davidson*, 38 Ill. 437; *Parker v. Wetherell*, 44 Ill. App. 95.

⁵ *Croskey v. Skinner*, 44 Ill. 321.

⁶ *Mason v. Burton*, 54 Ill. 349.

⁷ *Hayes v. Graham*, 2 Scam. 429.

⁸ *Holbrook v. Vibbard*, 2 Scam. 465; *Gay v. Rainey*, 89 Ill. 221; *Dunnigan v. Stevens*, 122 Ill. 396; *Wooley v. Lynn*, 117 Ill. 244.

⁹ *Aymar v. Sheldon*, 12 Wend. 439.

The remote assignor of a note is liable to an action by the last assignee, upon any ground upon which an assignor can in any case be made liable.¹ It is unnecessary, in such action against a remote assignor, to set forth the intermediate indorsements, but the plaintiff may simply aver that the defendant indorsed the note to him.² And it seems that the right of an assignee to sue remote assignor will not be impaired by the fact that the former has obtained a judgment against an intermediate assignor.³

Suits against defendants severally liable only.—By an amendment to the Illinois statute in relation to negotiable instruments, in force July 1, 1895, it is provided that “persons severally liable upon bills of exchange or promissory notes, payable in money, may all or any of them severally be included in the same suit at the option of the plaintiff, and judgment rendered in said suit shall be without prejudice to the rights of the several defendants as between themselves.”

Said amendment also prescribes the manner in which judgment in any such suit shall be entered, and the proceedings as to the other defendants where the judgment is paid by one or where all the defendants have not been served.⁴ Prior to the enactment of said amendment, where there were several indorsements on a note the consecutive indorsers were liable severally only, and could not be sued jointly.⁵

Measure of damages.—In a suit by an assignee against an assignor of a note, the measure of damages is the amount paid by the assignee for the note, with interest on that amount,⁶ with the limitation that the recovery must not exceed the sum due upon the face of the note;⁷ and it is said the plaintiff's costs in the suit against the maker are recoverable in the suit against the assignor.⁸

Diligence required of maker.—By the statute of Illinois,

¹ *Hayes v. Graham*, 2 Scam. 429;
Clifford v. Keating, 3 Scam. 250;
Roberts v. Haskell, 20 Ill. 59.

² *Hayes v. Graham*, 2 Scam. 429;
Chit. on Bills, 572.

³ *Hayes v. Graham*, 2 Scam. 429.

⁴ Rev. Stat. (1895), 1061-2.

⁵ *Brown v. Knowler*, 1 Scam. 470;

Givens v. Bank, 85 Ill. 442; *Kayser v. Hall*, 85 Ill. 511.

⁶ *Raplee v. Morgan*, 2 Scam. 561;
Wilson v. Van Winkle, 2 Gilm. 684.

⁷ *Schaeffer v. Hodges*, 54 Ill. 337;
Short v. Coffeen, 76 Ill. 245.

⁸ *Corgan v. Frew*, 39 Ill. 31.

the assignor of a negotiable instrument is liable to the action of the assignee, if the latter has without avail used due diligence, by the institution and prosecution of a suit, to compel the maker to pay the debt; but the assignee is excused from using such diligence, where the institution of a suit against the maker would have been unavailing, or where the maker had absconded, or resided without or had left the state, when the instrument became due.¹

Where the plaintiff in a suit against the indorser relies upon the insolvency of the maker, the burden is upon him to show that such insolvency continued until the commencement of the suit.² Upon a note assigned after maturity, the assignor is chargeable if the assignee has been unable to compel payment by the maker, after using due diligence by suit, or if such suit would have been unavailing.³

Diligence, to charge the assignor, must be by suit,⁴ and the absence of the maker from the county is not a sufficient excuse for not bringing suit.⁵ Such suit must be brought to the first term of court after the note falls due.⁶ But where it was previously announced by the judge that the term would not be held, it was decided that the assignee was not required to bring suit to such term;⁷ and it seems he would be excused from commencing his action at the first term, if unable by diligent effort to ascertain in time, the residence of the maker.⁸ Where the amount is within the jurisdiction of a justice of the peace, it has been held that a suit brought on the note, before a justice, within three days after maturity,

¹ Rev. Stat. (1895), 1061; *Barber v. Bell*, 77 Ill. 490; *Wickersham v. Altom*, 77 Ill. 620; *Kayser v. Hall*, 85 Ill. 511; *Baer v. Lichten*, 24 Ill. App. 311; *Telford v. Garrels*, 132 Ill. 550.

² *Baer v. Lichten*, 24 Ill. App. 311; *Bledsoe v. Graves*, 4 Scam. 382; *Summers v. Sheldon*, 40 Ill. App. 189.

³ *Crouch v. Hall*, 15 Ill. 263; see *Pierce v. Short*, 14 Ill. 144; *Clayes v. White*, 83 Ill. 540; *Aldrich v. Goodell*, 75 Ill. 453; *Babcock v.*

Blanchard, 86 Ill. 165; *Bonnell v. Holt*, 89 Ill. 71; *Woolverton v. Taylor*, 43 Ill. App. 424.

⁴ *Mason v. Wash*, Breese 39.

⁵ *Tarlton v. Miller*, Breese 68.

⁶ *Lusk v. Cook*, Breese, 84; *Chalmers v. Moore*, 22 Ill. 359; *Kayser v. Hall*, 85 Ill. 511; *Finley v. Green*, 85 Ill. 535; *Baer v. Lichten*, 24 Ill. App. 311; *Garrity v. Betts*, 20 Ill. App. 327.

⁷ *Brown v. Pease*, 3 Gilm. 191.

⁸ *Bestor v. Walker*, 4 Gilm. 14.

was in good time.¹ And it seems the assignee ought to sue before a justice, if the amount is within a justice's jurisdiction, and satisfaction of the debt could thus be sooner obtained.²

Suit must not only be brought, but everything in the assignee's power must be done to obtain judgment, at the first term.³ And he must proceed with diligence to enforce the judgment by execution, unless it can be clearly shown that execution would be unavailing.⁴ If a justice's judgment, execution must be sued out thereon, and returned "no property," and then a transcript of the judgment must be filed in the office of the clerk of the circuit court, and execution issued thereon, so as to reach any real estate of the maker, and such execution must be returned in like manner.⁵

But the assignee is not bound to apply to a court of chancery to remove obstructions in the way of an execution against the property of the maker;⁶ nor, it would seem, to have a *ca. sa.* issued;⁷ nor to resort to process of garnishment against debtors of the maker—not, at least, unless the assignee had notice of the existence of the debts, if indeed he is bound in any event to pursue that remedy;⁸ nor to present his claim in the United States district court, in a proceeding in bankruptcy against the maker;⁹ nor, it would seem, to cause goods of a non-resident maker to be attached *in transitu*.¹⁰

The execution must remain in the officer's hands during its whole lifetime; or, if returned before the expiration of that time, the assignee must aver and prove that its further continuance in the hands of the officer would have been unavailing.¹¹

The execution must issue to the county in which the suit was brought;¹² and the assignee is not required to seek elsewhere with an execution for property of the maker; though if the maker has property in another county, and that fact is

¹ *Raplee v. Morgan*, 2 Scam. 561.

² *Allison v. Smith*, 20 Ill. 104.

³ *Bestor v. Walker*, 4 Gilm. 3.

⁴ *Gay v. Rainey*, 89 Ill. 221.

⁵ *Saunders v. O'Briant*, 2 Scam.

370.

⁶ *Bledsoe v. Graves*, 4 Scam. 383.

⁷ *Cowles v. Litchfield*, 2 Scam. 359.

⁸ *Pierce v. Short*, 14 Ill. 146.

⁹ *Booth v. Storrs*, 54 Ill. 472.

¹⁰ *Mason v. Burton*, 54 Ill. 349.

¹¹ *Hamlin v. Reynolds*, 22 Ill. 207.

¹² *Bestor v. Walker*, 4 Gilm. 18.

known to the assignee, it would seem that he ought to endeavor to make his money out of such property.¹

The suit against the maker must be brought in the county where he resides, and the assignee is not required to sue in any other.² If, however, his residence is wholly unknown to the assignee, the latter may elect to consider as the place of the maker's residence the county where the note was made, if he is found there.³

If the assignee, by reasonable diligence, might have known of property of the maker, sufficient to satisfy the debt, in the county where the suit against the latter was brought, the former can not recover against the assignor.⁴ If the maker has property worth more than any incumbrance on it, it is the duty of the assignee to have it levied on, and at least offered for sale; and whenever others set up claims to property in possession of the maker, the assignee is bound to contest those claims, or take the responsibility of showing their validity.⁵

The assignor will be liable where the assignee is unable to compel payment from the maker by reason of fraud or other matter in the original contract between the maker and the payee.⁶ It will be seen from the authorities cited that the assignee may excuse any neglect, or cessation of effort, on his part, in his proceedings against the maker, by showing that any greater or further diligence would have availed nothing.

No. 48. Indorseæ against indorser of promissory note—Suit against the maker unavailing.

(*State making and indorsement of note, as in last precedent and proceed thus:*) And although on, etc., the said note became due, the said E. F. did not nor would then, or at any time before or afterward, pay to the plaintiff the amount of the said note, or any part thereof; (*) and the plaintiff avers that the said E. F. was when the said note became due as aforesaid, and from thence hitherto has continued to be, insolvent, and unable to pay the said amount, or any part thereof, wherefore the institution of a suit against him on the said note, at that time or afterward, would have been unavailing; of which premises the defendant then and there had notice: By means

¹ *Bestor v. Walker*, 4 Gilm. 3.

⁵ *Roberts v. Haskell*, 20 Ill. 59;

² *Bestor v. Walker*, 4 Gilm. 3; *Chalmers v. Moore*, 22 Ill. 359.

Judson v. Gookwin, 37 Ill. 286.

⁶ *Wilson v. Van Winkle*, 2 Gilm.

³ *Bestor v. Walker*, 4 Gilm. 3.

684.

⁴ *Nixon v. Weyrich*, 20 Ill. 600.

whereof, the defendant then and there became liable to pay to the plaintiff, on request, the amount of the said note; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said amount, on request. Yet the defendant, though requested, has not paid the same, or any part thereof, to the plaintiff, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

It is not sufficient to allege in the declaration, in the general terms used in the statute, that a suit against the maker would have been unavailing. The declaration must show why such suit would have been useless, as that the maker was insolvent, or that the note was made without any consideration, and was assigned after maturity.¹

In order to charge the assignor on the ground of the maker's insolvency, it should appear not simply that his liabilities exceeded his means of payment, but, in the language of the statute, that the institution of a suit against him would have been unavailing.² But where the maker has only the kind and amount of property which is exempt from execution, the assignee is not bound to proceed against him upon the bare possibility that the debtor will not insist upon the exemption.³

Though the maker may have been solvent at the maturity of the note, yet the assignor is not released from liability unless such solvency continued until a suit could have been made availing.⁴ If it appears that by the use of proper diligence the maker could have been compelled to pay any considerable part of the debt, the assignor will only be liable for the residue.⁵

No. 49. Indorsee against indorser, the maker having absconded, or left the state.

(As in last precedent to the (*), and then proceed thus:) And the plaintiff avers, that before the said note became due as aforesaid, to wit, on, etc., the said E. F. *absconded and left* the said State of Illinois, and from thence

¹ *Humphreys v. Collier*, 1 Scam. 53; *Harmon v. Thornton*, 2 Scam. 351; *Bledsoe v. Graves*, 4 Scam. 383; *Crouch v. Hall*, 15 Ill. 264.

² *Bestor v. Walker*, 4 Gilm. 3; *Shufeldt v. Sutphen*, 52 Ill. 255.

³ *Pierce v. Short*, 14 Ill. 146; *Hamlin v. Reynolds*, 22 Ill. 207.

⁴ *White v. Clayes*, 32 Ill. 325.

⁵ *White v. Clayes*, 32 Ill. 325.

hitherto has remained out of the said state; of which premises the defendant, on, etc., there had notice: By means whereof, etc. (*State liability, promise and breach, as in last precedent.*)

If the maker is absent from the state at the time when, in order to fix the liability of the assignor, a suit should be commenced against the maker, or at the first term after the note falls due, then the assignor is liable.¹ The assignee is not bound to pursue the maker into a foreign jurisdiction, but may at once resort to the assignor for payment. The circumstance that the maker resided in another state, and that this was known to the assignee when he received the note, does not vary the liability of the assignor, which is the same whether the maker left the state after making the note, or never lived in the state.² But the supreme court has said that the liability of an assignor does not arise from a mere temporary absence of the maker from the state when the note falls due, or when the suit is about to be commenced.³

In a case where the maker resided in another state, at and ever after the time of the making of the note, which was assigned *after* it became due, it was held that the contract of the assignor was that he would pay the money if it could not be made of the maker by the use of diligence by suit, or if a suit would be unavailing; and that the case was not within that clause of the statute which makes the assignor liable if the maker is not within the state when the note matures.⁴

The liability of the assignor having once attached, by reason of the absence of the maker from the state at the maturity of the note, it seems that liability would not be discharged, although the maker was frequently in the state, buying goods and shipping them away, after the note became due, and before suit brought against the assignor, and this was known to the assignee.⁵

¹ *Hilborn v. Artus*, 3 Scam. 344; *Mason v. Burton*, 54 Ill. 349; *Aldrich v. Goodell*, 75 Ill. 453; *Barber v. Bell*, 77 Ill. 490.

² *Schuttler v. Piatt*, 12 Ill. 418; *Mason v. Burton*, 54 Ill. 349.

³ *Hilborn v. Artus*, 3 Scam. 344.

⁴ *Crouch v. Hall*, 15 Ill. 263; *Pierce v. Short*, 14 Ill. 144.

⁵ *Mason v. Burton*, 54 Ill. 349.

No. 50. Payee against guarantor of promissory note.

(Commence as in No. 37, ante, page 91.) For that whereas one E. F., on, etc., in the county aforesaid, made his promissory note, and thereby then and there promised to pay, — — after the date thereof, to the plaintiff, or his order, the sum of — dollars, for value received, *with interest thereon, etc.*; and thereupon, on the day *first* aforesaid, in consideration that the plaintiff, at the request of the defendant, would accept and receive of the said E. F. the said note, the defendant, by his indorsement thereon, there guaranteed the payment of the said sum of money, and promised the plaintiff to pay him the same, according to the tenor and effect of the said note, if the said E. F. should not so pay the same. And the plaintiff avers that thereupon he, confiding in the said undertaking of the defendant, then and there accepted and received of the said E. F. the note aforesaid; and that although the day of payment in the said note specified has elapsed, the said E. F. did not nor would on that day, or at any other time, pay to the plaintiff the amount of the said note, or any part thereof, but refused so to do; whereof the defendant, on the day last aforesaid, there had notice. Yet the defendant has not paid to the plaintiff the amount of the said note, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The liability of the guarantor of a promissory note does not depend upon the use of diligence in prosecuting the maker, etc., nor is any demand necessary, or notice of non-payment, to fix such liability. Upon the failure of the maker to pay at the maturity of the note, the holder may at once sue the guarantor, and recover the amount due.¹ But it is said that the defendant may discharge himself from liability by showing *laches* on the part of the plaintiff, such as an omission to make demand and give notice within a reasonable time, and a consequent injury—the burden of proof being on the defendant.²

In an action on a guaranty of a note, it is necessary to aver and prove a consideration; but in the absence of proof to the contrary, the presumption is that the guaranty was made when the note was executed, in which case, the guaranty being a part of the original transaction, the consideration of the note is the consideration of the guaranty, and no new consideration needs to be shown. Where, however, it appears that the guaranty was made after the note was delivered, the

¹ *Heaton v. Hulbert*, 3 Scam. 489; *Carroll v. Weld*, 13 Ill. 682; *Klein v. Currier*, 14 Ill. 237; *Rich v. Huthaway*, 18 Ill. 548; *Hance v. Miller*, 21

Ill. 638; *Hooker v. Gooding*, 86 Ill. 60; *Gridley v. Capen*, 72 Ill. 11.

² *Heaton v. Hulbert*, 3 Scam. 489; *Gage v. Bank*, 79 Ill. 62.

plaintiff must show a new consideration.¹ A guaranty by the *payee* needs no new consideration, though made long after the execution of the note.² A blank indorsement of a promissory note, at the time of its execution, by a person not a party to the note, is evidence *prima facie* of a liability as guarantor, and is authority to a holder in good faith to write a guaranty over the signature. This presumption may, however, be rebutted.³ Where the *payee* or *holder* of a note has indorsed it in blank, the presumption is only that he assumed the liability imposed by the statute upon an assignor, and the blank may be filled with the assignment usually employed for the transfer of such paper.⁴ The general rule is, that an indorsement in blank gives authority to the holder of the instrument to fill up the indorsement by writing over the signature anything consistent with the nature of the instrument and the intention of the parties.⁵

Although the signature of a third person on the back of a note in the hands of the payee, is evidence *prima facie* of the liability of such third person as a guarantor, yet it seems that where a note has gone into circulation, and passed under blank indorsements, from holder to holder, it ought to be shown that the name of the person sought to be held liable as guarantor was on the note while in the hands of the payee.⁶

A note payable to the order of the maker has no validity until his name is indorsed thereon; and another person writ-

¹ *Carroll v. Weld*, 13 Ill. 682; *Klein v. Currier*, 14 Ill. 237; *Rich v. Hathaway*, 18 Ill. 548; *Harwood v. Johnson*, 20 Ill. 367; *Joslyn v. Col-linson*, 26 Ill. 61; *Heintz v. Cahn*, 29 Ill. 308; *Parkhurst v. Vail*, 73 Ill. 343; Story on Bills, Sec. 458; 2 Story on Cont., Sec. 685; *Grier v. Cable*, 45 Ill. App. 405.

² *Judson v. Gookwin*, 37 Ill. 286.

³ *Camden v. McKoy*, 3 Scam. 437; *Cushman v. Dement*, 3 Scam. 497; *Heintz v. Cahn*, 29 Ill. 308; *Underwood v. Hossack*, 38 Ill. 208; *Lincoln v. Hinzey*, 51 Ill. 435; *Glickauf v. Kaufman*, 73 Ill. 378; *Pahlman*

v. Taylor, 75 Ill. 629; *Eberhart v. Page*, 89 Ill. 550; *Schnell v. M. Co.*, 89 Ill. 581; *Boynton v. Pierce*, 79 Ill. 146; *Stowell v. Raymond*, 83 Ill. 120; *Bank v. Nixon*, 125 Ill. 615; *Kingsland v. Koeppe*, 137 Ill. 344; *Bank v. Nordgren*, 57 Ill. App. 346; *Coal Co. v. Crane*, 138 Ill. 207.

⁴ *Hance v. Miller*, 21 Ill. 636.

⁵ *Camden v. McKoy*, 3 Scam. 437; *Webster v. Cobb*, 17 Ill. 459; *Hance v. Miller*, 21 Ill. 636; *Boynton v. Pierce*, 79 Ill. 145; *Bank v. Diefendorf*, 90 Ill. 396; *Featherstone v. Hendrick*, 59 Ill. App. 497.

⁶ *Webster v. Cobb*, 17 Ill. 459.

ing his name on it before it is thus indorsed, undertakes that when the note takes effect his name shall appear thereon as second indorser. His contract is not that of a guarantor.¹

Where an assignor of a note guarantees it, the holder may recover upon the contract of assignment or upon the guaranty, as he may choose.² A guarantor is not liable beyond the express terms of his contract, and a material alteration of such terms will avoid it.³

An indorsement in the form of a guaranty will pass the title and also bind the maker as guarantor.⁴ By the words, "I guarantee the *collection of the* within note," the liability of an assignor is neither increased nor diminished. He is simply liable as an assignor.⁵ But where the payee indorses upon the note, "*I guarantee the payment of the within note at maturity*," he is liable to pay the note at maturity and the holder is under no obligation to demand payment of the maker.⁶

The guarantor of the payment of a promissory note is not jointly liable with the maker of the note. In such case the note and guaranty are separate and distinct contracts, and the guarantor is not liable until the failure of the maker of the note to pay the same at its maturity.⁷ On the subject of guaranty, the additional authorities noted below may be consulted.⁸

¹ *Blatchford v. Millikin*, 35 Ill. 434; *Kayser v. Hall*, 85 Ill. 511; *Bank v. Nordgren*, 57 Ill. App. 347.

² *Hance v. Miller*, 21 Ill. 636.

³ *Newlan v. Harrington*, 24 Ill. 206.

⁴ *Heaton v. Hulbert*, 3 Scam. 489; *Parker v. Wetherell*, 44 Ill. App. 95.

⁵ *Judson v. Gookwin*, 37 Ill. 286.

⁶ *Heaton v. Hulbert*, 3 Scam. 489; *Gage v. Bank*, 79 Ill. 62.

⁷ *Abbott v. Brown*, 131 Ill. 108; see Rev. Stat. (1895) 1061.

⁸ *Knoebel v. Kircher*, 33 Ill. 308; *Otto v. Jackson*, 35 Ill. 349; *Childs v. Davidson*, 38 Ill. 437; *Dickerson v. Dorrickson*, 39 Ill. 574; *Voltz v. Harris*, 40 Ill. 155; *White v. Weaver*, 41 Ill. 409; *Allen v. Coffil*, 42 Ill. 294;

Dietrich v. Mitchell, 43 Ill. 40; *Croskey v. Skinner*, 44 Ill. 321; *Byington v. Gaff*, 44 Ill. 510; *Dustin v. Hodgen*, 47 Ill. 125; *Hatch v. Antrim*, 51 Ill. 106; *Darst v. Bates*, 51 Ill. 439; *Andrus v. Carpenter*, 52 Ill. 171; *Gage v. Lewis*, 68 Ill. 604; *Penny v. Crane*, 80 Ill. 244; *Hamilton v. Johnston*, 82 Ill. 39; *Bank v. Frazer*, 86 Ill. 133; *Munson v. Adams*, 89 Ill. 450; *Ricketson v. Giles*, 91 Ill. 154; *Davis v. Blackwell*, 5 Bradw. 32; *King v. Hannah*, 6 Bradw. 495; *Edwards v. Shields*, 7 Bradw. 70; *Spurck v. Leonard*, 9 Brad. 174; *Clark v. Morgan*, 13 Bradw. 597; *Pool v. Roberts*, 19 Bradw. 438; *Johnson v. Glover*, 19 Ill. App. 585; *Kinsley v. Charnley*,

No. 51. Payee against drawer, on an order not accepted.

(Commence as in No. 37, ante, page 91.) For that whereas the defendant, on, etc., in, etc., made his order in writing, and delivered the same to the plaintiff, and thereby then and there requested one E. F. to pay to the plaintiff, or his order, the sum of — dollars, on demand, and charge the same to the account of the defendant: And the plaintiff avers, that on the day aforesaid, he there presented the said order to the said E. F., and requested him to accept the same, and pay the said sum of money: but that the said E. F. did not, nor would then or afterward accept the said order, or pay the said sum of money, or any part thereof, but refused so to do; whereof the defendant then and there had notice: By means whereof the defendant then and there became liable to pay to the plaintiff, on request, the said sum of money; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money on request. Yet the defendant, though requested, has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

(The common counts, etc., as directed in No. 37, ante, page 91. may be inserted, in which case conclude with general breach, as follows:)

Yet the defendant, though requested, has not paid to the plaintiff the said several sums of money above specified, or any or either of them, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 52. Payee of a check against drawer.

(Commence as in No. 37, ante, page 91.) For that whereas the defendant, on, etc., in the county aforesaid, made his order in writing, commonly called a check, on a banker, and directed the same to certain persons by the name and style of Messrs. E. F. and G. H., and thereby required the said Messrs. E. F. and G. H. to pay to the plaintiff, or bearer, the sum of — dollars, and then and there delivered the said order to the plaintiff: And the plaintiff avers, that on the day aforesaid the said order was there presented to the said Messrs. E. F. and G. H. for payment thereof, and they were then and there requested to pay the said sum of money, according to the tenor and effect of the said order; but that the said Messrs. E. F. and G. H. did not nor would then, or at any other time, pay the said sum of money, or any part thereof, but refused so to do; whereof the defendant then and there had notice: By means whereof the defendant then and there became liable to pay to the plaintiff, on request, the said sum of money; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money on request.

(The common counts, etc., may be added, as directed in last precedent.)

33 Ill. App. 556; *Ruffner v. Love*, 33 Ill. App. 605; *Delemeter v. Kearns*, 35 Ill. App. 634; *Swigart v. Weare*, 37 Ill. App. 262; *Donovan v. Griswold*, 37 Ill. App. 616; *Bank v. Bank*, 40 Ill. App. 641; *Frankel v. Stern*, 50 Ill. App. 54; *Brandner v. Krebbs*, 54 Ill. App. 652.

In order to fix the liability of the drawer on an inland bill of exchange, or check, in case of non-payment, the holder should present the bill or check to the person or bank on which it is drawn, within business hours of the day next succeeding the receipt of the paper, and give notice of the dishonor to the drawer.¹

If the holder of a bank check, instead of demanding its payment, obtains its certification by the bank, he will thereby discharge the drawer of the check from all liability, and its presentment on the next business day after its issue and non-payment will not in any manner revive the drawer's liability. The rule is different when the drawer procures the certification of his check before its delivery to the drawee. In that case the drawer will be liable for non-payment on presentation.² The giving of a check by a depositor in a bank operates, at least after presentment, as an assignment to the holder of a sufficient amount of the deposit to pay the check, and is therefore a definite appropriation of that sum to its payment, binding upon all the parties to the check.³

DECLARATIONS ON INLAND BILLS OF EXCHANGE.

No. 53. Drawer against acceptor, on a bill accepted generally.

(Commence as in No. 37, ante, page 91.) For that whereas the plaintiff (by the name and style of — —) on, etc., in the county aforesaid, made his bill of exchange, and directed the same to the defendant (styling him — —), and thereby then and there requested the defendant to pay, — — after the date thereof, to the plaintiff, or his order, the sum of — — dollars, for value received, with interest thereon, from the date of the said bill, at the rate of — — per centum per annum; which said bill the defendant (by the said name and style of — —) on the day first aforesaid, upon sight thereof, there accepted: By means whereof the defendant then and there became liable to pay to the plaintiff the said sum of money, according to the tenor and effect of the said bill and of the said acceptance thereof; and

¹ 1 Parsons on Notes, etc., 446, 447; *Bickford v. Bank*, 42 Ill. 238; *McDonald v. Mosher*, 23 Ill. App. 206; *Bank v. Cornhauser*, 37 Ill. App. 480; *Star v. Smith*, Id. 218; *Madderon v. Heath*, 35 Ill. App. 590.

² *Bank v. Jones*, 137 Ill. 634; *Bank v. Cornhauser*, 37 Ill. App. 475.

³ *Bank v. Jones*, 137 Ill. 634; see *Brown v. Leckie*, 43 Ill. 497; *Bank v. Bank*, 80 Ill. 212; *Bank v. Ind. Banking Co.*, 114 Ill. 483; *Hogan v. Edwards*, 9 Bradw. 148; *Pabst v. Reeves*, 42 Ill. App. 154; *Bank v. Retzinger*, 20 Bradw. 27.

being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money, according to the tenor and effect of the said bill and of the acceptance thereof aforesaid.

(Add common counts, etc., and breach, as in No. 37, ante, page 91, using the word BILL, instead of NOTE, in the breach.)

If the bill is payable so many days after *sight*, describe it accordingly. In that case the words in the breach, "although the day of payment in the said bill specified has elapsed," are unnecessary.

Though usual to state the address of the bill—that the drawer "directed the same to the said," etc., it seems it is unnecessary to do so. It is, however, sometimes convenient, for the purpose of alleging the name by which the drawee is styled in the bill, if he is misdescribed therein. If the bill is not *addressed* to the drawee, this statement should be omitted.

If the acceptance is dated on a day different from the date of the bill, it should be so described. An acceptance by an agent may be described as made by the party himself.¹ The pleader should observe that the precedents given are framed upon bills as usually drawn; but as bills vary in tenor, care should be taken not to follow the forms too closely, for fear of a variance. The precedents given of declarations on promissory notes will be useful to the pleader in framing declarations on bills of exchange; and for declarations by and against particular persons, he is referred to those precedents.

No. 54. Drawer against acceptor, on his acceptance, varying as to time from bill.

(Commence as in No. 37, ante, page 91; and after stating the bill, as in last precedent, payable in thirty days for instance, proceed as follows :) which said bill the defendant, on the day *first* aforesaid, upon sight thereof, there accepted, payable *ninety days* after the date of the said bill: By means whereof the defendant, on the day *first* aforesaid, there became liable to pay to the plaintiff the amount of the said bill, according to the tenor and effect of the said acceptance thereof; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said amount, according to the tenor and effect of the acceptance aforesaid.

(Add the common counts, etc., as in No. 37 ante, page 91. The breach will be as follows:)

Yet although the day of payment in the said acceptance specified has

¹ Chit. on Bills, 357.

elapsed, the defendant has not paid to the plaintiff the amount of the said bill, or any part thereof, but refuses so to do; nor has the said defendant, though requested, paid to the plaintiff the several other sums of money above specified, or any or either of them, or any part thereof, but refuses to pay the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 55. Drawer against acceptor, on a bill payable to a third person, and returned to and taken up by drawer.

(Commence as in No. 37, ante, page 91.) For that whereas the plaintiffs, on, etc., in the county aforesaid, made their bill of exchange, and delivered the same to Messrs. J. A. & Co., and thereby then and there requested the defendants to pay, — — after the date thereof, to the said Messrs. J. A. & Co., or their order, the sum of — dollars, for value received; which said bill the defendants, on the day *first* aforesaid, upon sight thereof, there accepted: And the plaintiffs aver, that when the said bill became due, to wit, on, etc., the same was there presented to the defendants for payment thereof, and they were then and there requested to pay the said sum of money, according to the tenor and effect of the said bill, and of their acceptance thereof aforesaid; but that the defendants did not nor would then, or at any time before or afterward, pay the amount of the said bill, or any part thereof, but refused so to do; and thereupon the said bill was then and there returned to the plaintiffs for non-payment thereof, and they were called upon and obliged to pay, and did then and there pay, the amount of the said bill to the said Messrs. J. A. & Co., whereof the defendants then and there had notice: By means whereof the defendants then and there became liable to pay to the plaintiffs, on request, the amount of the said bill; and being so liable, the defendants, in consideration thereof, then and there promised the plaintiffs to pay them the said amount on request.

(Add the common counts, etc., as in No. 37, ante, page 91. *The breach will be as follows:*)

Yet the defendants, though requested, have not paid to the plaintiffs the amount of the said bill, or any part thereof, or the several other sums of money above specified, or any or either of them, or any part thereof, but refuse so to do; to the damage of the plaintiffs of — dollars, and therefore they bring their suit, etc.

If the plaintiff has been compelled to pay to any other holder than the payee of the bill, the fact of payment should be averred accordingly. The averment of presentment to the defendant, he being the acceptor, may perhaps not be strictly necessary,¹ and should not be made unless it can be proved. It is certainly necessary to show that the defendant did not

¹ *Bank v. Smith*, 11 Wheat. 171; *Foden v. Sharp*, 4 Johns. 183.

pay the bill, and that it was returned to the plaintiff, as the latter has no title to it except by virtue of those facts.¹

It is not necessary to state the names of partners who are parties to a bill of exchange or promissory note, unless they are plaintiffs or defendants. Thus a bill or note may be alleged to have been made by "certain persons using the style and firm of John Smith & Co.," or to have been payable to "certain persons by the name and style of William Jones & Co." (or, it seems, simply by "Smith & Co.," or to "William Jones & Co."); and thereafter the makers, etc., may be described throughout as "the said drawers of the said bill," or "payees," etc., as the case may be.²

No. 56. Payee against acceptor, on bill accepted generally.

(Commence as in No. 37, ante, page 91.) For that whereas one E. F., on, etc., in the county, aforesaid, made his bill of exchange, and delivered the same to the plaintiff, and thereby then and there requested the defendant to pay, — — after the date thereof, to the plaintiff, or his order, the sum of — — dollars, for value received; which said bill the defendant, on the day *first* aforesaid, upon sight thereof, there accepted: By means whereof the defendant then and there became liable to pay to the plaintiff the said sum of money, according to the tenor and effect of the said bill and of the said acceptance thereof: and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money, according to the tenor and effect of the said bill and of the acceptance thereof aforesaid.

(Add the money counts, etc., as in No. 40, ante, page 94, using the word BILL, instead of NOTE, in the breach.)

No. 57. First, or subsequent, indorsee against acceptor.

(Commence as in No. 37, ante, page 91.) For that whereas one E. F., on etc., in, etc., made his bill of exchange, and delivered the same to one G. H., and thereby then and there requested the defendant to pay, — — after the date thereof, to the said G. H., or his order, the sum of — — dollars, for value received; which said bill the defendant, on the day *first* aforesaid, upon sight thereof, there accepted; and thereupon the said G. H. then and there indorsed and delivered the said bill to one F. K., who thereupon then and there indorsed and delivered the same to the plaintiff: By means whereof the defendant then and there became liable to pay to the plaintiff the said sum of money, according to the tenor and effect of the said bill and of the said acceptance thereof; and being so liable, the defendant, in consideration

¹ 1 Swan's Pr. 240; 2 Chit. Pl. 241, note; Bagley on Bills, 264; *Case* 147, n. a.

v. *Hefner*, 10 Ohio 180.

² 2 Chit. Pl. 150; 1 Swan's Pr.

thereof, then and there promised the plaintiff to pay him the said sum of money, according to the tenor and effect of the said bill and of the acceptance thereof aforesaid.

(Add the money counts, etc., as in No. 40, ante, page 94, using the word BILL, instead of NOTE, in the breach.)

No. 58. Payee against drawer of bill, on default of acceptance.

(Commence as in No. 37, ante, page 91.) For that whereas the defendant on, etc., in the county aforesaid, made his bill of exchange, and delivered the same to the plaintiff, and thereby then and there requested one E. F. to pay, — — after the date thereof, to the plaintiff, or his order, the sum of — dollars, for value received: And the plaintiff avers, that on, etc., the said bill was there presented to the said E. F., for his acceptance thereof, and he was then and there requested to accept the same; but that the said E. F. did not nor would then, or at any time afterward, accept the said bill, or pay the amount of the same, or any part thereof, but refused so to do; (*) of which premises the defendant then and there had notice: By means whereof the defendant then and there became liable to pay to the plaintiff, on request, the amount of the said bill; and being so liable, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said amount on request.

(If the drawer had no effects in the hands of the drawee, and notice of non-acceptance can not be proved, add a count like the next form, and also add counts on the consideration of the bill, and the money counts, etc., as directed in No. 37, ante, page 91. The breach will be as follows:)

Yet the defendant, though requested, has not paid to the plaintiff the amount of the said bills, or either of them, or any part thereof, or the several other sums of money above specified, or any or either or any part of the same, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 59. Payee against drawer—Defendant had no effects in drawer's hands.

First count same as last precedent; second count same as far as the asterisk, and then proceed as follows:) And the plaintiff avers, that at the time of the making of the last mentioned bill, and from thence until and at the time when the same was so presented to the said E. F. for his acceptance thereof, as aforesaid, he, the said E. F., had not in his hands any effects of the defendant, nor had he, the said E. F., received any consideration from the defendant for the acceptance or payment by him, the said E. F., of the last mentioned bill, nor has the defendant sustained any damage by reason of his not having had notice of the non-acceptance of the same by the said E. F.; of which premises the defendant, on the day last aforesaid, there had notice: By means whereof, etc.

(State liability, and promise to pay on request, as in last precedent.)

No. 60. Payee against drawer, on default of payment.

(Commence as in No. 37, ante, page 91.) For that whereas the defendant, on, etc., in the county aforesaid, made his bill of exchange, and delivered

the same to the plaintiff, and thereby then and there requested one E. F. to pay, — — after the date thereof, to the plaintiff, or his order, the sum of — dollars, for value received; which said bill the said E. F., on the day first aforesaid, upon sight thereof, there accepted: And the plaintiff avers that when the said bill became due, to wit, on, etc., the same was there presented to the said E. F. for payment thereof, and he was then and there requested to pay the said sum of money, according to the tenor and effect of the bill; but that the said E. F. did not nor would then, or at any time before or afterward, pay the amount of the said bill, or any part thereof, but refused so to do; of which premises the defendant then and there had notice: By means, etc.

(State defendant's liability, and promise to pay the amount of the bill on request. If doubtful whether due notice to defendant of non-payment can be proved, and he had no effects in hands of drawee, insert a count like the last precedent, No. 59, averring that "at the time of the making of the last-mentioned bill, and from thence until and at the time when the same was so presented to the said E. F. for payment thereof," the defendant had no effects, etc.; and add common counts, etc., and breach, as suggested in No. 58.)

Other counts may be inserted, according to the circumstances, viz.: a count alleging that the defendant dispensed with presentment for payment; a count alleging that the drawee could not be found;¹ and one averring that the drawee was dead.² It seems that the averment of acceptance in the above precedent, though usual, is unnecessary, and should be omitted if there is any doubt as to the proof of the acceptance.³

Where sufficient notice to the drawer of non-payment is not proved, the bill may still be admitted, and authorize a recovery, under the common money counts, if the evidence shows a waiver of notice, or that the defendant had no funds in the hands of the drawee,⁴ or, it is presumed, if any other matter appears, sufficient to excuse notice.

To charge the drawer of a bill of exchange by the payee, upon the ground of non-acceptance or non-payment, it is usually essential that proof be made of prompt notice to the drawer of such non-payment or non-acceptance, as the case may be. Notice to the drawer of a bill of exchange of its non-acceptance or non-payment by the drawee is not essential, when the

¹ 2 Chit. Pl. 160; 1 Swan's Pr. 247, 248.

² 2 Chit. Pl. 158; 1 Swan's Pr. 243.

⁴ *Brower v. Rupert*, 24 Ill. 182.

³ 1 Swan's Pr. 248.

drawer is so situated that he can not be prejudiced by the want of notice.

When a drawer of a bill of exchange in good faith believes that he has funds in the hands of the drawee to meet the bill, though in fact he may not have such funds, he is entitled to prompt notice of the non-acceptance or non-payment, and if such notice is not given he will not be liable to the payee. In such case the law does not require the drawer to show that he has been actually injured by the want of notice, but only that he may have been so injured.¹

The leading additional cases in the supreme and appellate courts of Illinois, relating to bills of exchange, are noted below.²

ON WARRANTIES.

No. 61. *On a warranty of a horse to be sound.*

(Commence as in No. 40, ante, page 94.) For that whereas on, etc., in the county aforesaid, in consideration that the plaintiff, at the request of the defendant, would buy of the defendant a certain horse, at a certain price, to wit, the sum of — dollars, to be therefor paid by the plaintiff, the defendant promised the plaintiff that the said horse then was sound; and thereupon the plaintiff, confiding in the said promise of the defend-

¹ *Welch v. Mfg. Co.*, 82 Ill. 579.

² *Bradley v. Morris*, 3 Scam. 183; *Kaskaskia v. Shannon*, 1 Gilm. 15; *State Bank v. Stanton*, 2 Gilm. 352; *Strawbridge v. Robinson*, 5 Gilm. 471; *Dunlap v. Buckingham*, 16 Ill. 109; *Miller v. Lumsden*, 16 Ill. 161; *Adams v. King*, 16 Ill. 169; *R. R. Co. v. Neil*, 16 Ill. 269; *Bond v. Bragg*, 17 Ill. 69; *McAllister v. Smith*, 17 Ill. 328; *Harwood v. Tucker*, 18 Ill. 544; *Cook v. Renick*, 19 Ill. 598; *Cronise v. Kellogg*, 20 Ill. 11; *Curtis v. Martin*, 20 Ill. 557; *Diversy v. Moore*, 22 Ill. 331; *Diversy v. Loeb*, 22 Ill. 394; *Earll v. Mitchell*, 22 Ill. 530; *Sturges v. Bank*, 49 Ill. 220; *Lowe v. Bliss*, 24 Ill. 168; *Brower v. Rupert*, 24 Ill. 182; *Tobey v. Berley*, 26 Ill. 426; *Kupper v. Marc*, 28 Ill. 388; *Herring*

v. Woodhull, 29 Ill. 92; *Curtis v. Marrs*, 29 Ill. 508; *Hodgen v. Latham*, 30 Ill. 188; *Ins. Co. v. Tinscher*, 30 Ill. 399; *Gillilan v. Myers*, 31 Ill. 525; *Burnap v. Cook*, 32 Ill. 168; *Jones v. Bank*, 34 Ill. 313; *Kupfer v. Bank*, 34 Ill. 328; *Strong v. King*, 35 Ill. 9; *Mason v. Dousay*, 35 Ill. 424; *Walker v. Rogers*, 40 Ill. 278; *Wood v. Price*, 46 Ill. 435; *Rogers v. Gallagher*, 49 Ill. 182; *Sturges v. Bank*, 49 Ill. 220; *Phelps v. Northrup*, 56 Ill. 156; *Ray v. Faulkner*, 73 Ill. 469; *Nowak v. Stone Co.*, 78 Ill. 307; *Montelius v. Charles*, 76 Ill. 303; *Givens v. Bank*, 85 Ill. 442; *Wood v. Surrells*, 89 Ill. 107; *Bank v. Diefendorf*, 90 Ill. 396; *Hardy v. Ross*, 4 Bradw. 501; *Quinn v. Hanley*, 5 Bradw. 51; *Haines v. Nance*, 52 Ill. App. 406.

ant, then and there bought the said horse of the defendant and paid him therefor the said sum of money. Yet the defendant did not regard his said promise, but thereby deceived and defrauded the plaintiff, in this, to wit, that the said horse, at the time of the making of the said promise of the defendant, was not sound, but on the contrary thereof was at that time unsound; whereby the said horse there became and was of no value to the plaintiff, and the plaintiff has there been put to great charges and expenses, amounting to a large sum, to wit, — dollars, in and about the feeding, keeping, and taking care of the said horse.

(If only a part of the price was paid, aver that the plaintiff “paid him therefor the sum of — dollars, part of the said price, and then and there promised the defendant to pay him the residue thereof on request,” or “three months after that date,” as the case may be.)

(Second count.) And for that, whereas, also, on the day aforesaid, in the county aforesaid, in consideration that the plaintiff, at the request of the defendant, had then and there bought of the defendant a certain other horse, at a certain other price, to wit, the sum of — dollars, and had then and there paid that sum to the defendant for the last-mentioned horse, the defendant promised the plaintiff that the last-mentioned horse, at the time of the said sale thereof, was sound. Yet the defendant did not regard his last-mentioned promise, but thereby deceived and defrauded the plaintiff, in this, to wit, that the last-mentioned horse, at the time of the said sale thereof, was not sound, but on the contrary thereof was then unsound; whereby the same horse there became and was of no use or value, etc., etc. *(as in the first count).*

(A third count may be added, like the second, omitting the words in italics; and add a count for horse-keep, if there was any contract to that effect, and the money counts; and conclude as follows:)

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of — dollars, and therefore he brings his suit, etc.

The particular description of unsoundness is not required to be stated, it being a rule in pleading that the breach may in general be assigned in the negative of the words of the contract.¹ The above forms may be readily adapted to any case of warranty of a horse, as a warranty that the animal was “free from vice,” or was “sound, kind, and would go well in single or double harness,” etc. The warranty must be described accurately, and must be co-extensive with the breach.²

No. 62. On warranty of hops sold by sample.

(Commence as in No. 36 ante, page 91.) For that whereas on, etc., in the county aforesaid, in consideration that the plaintiff would buy of the de-

¹ Com. Dig. Pl. C. 45; 1 Chit. Pl. 281, note p. 291.

² Chit. Pl. 281, note p.

fendant, at his request, five pockets of hops, at a certain price, to wit, — dollars, the defendant promised the plaintiff to deliver to him the said five pockets of hops, and that the hops contained in the said five pockets, respectively, should all be of like goodness and quality with certain samples thereof, then and there shown by the defendant to the plaintiff, that is to say, a sample of the contents of each of the said five pockets: And the plaintiff avers that thereupon he, confiding in the said promise, then and there bought of the defendant the said five pockets of hops, at the price aforesaid; and the defendant afterward, to wit, on, etc., there delivered to the plaintiff five pockets of hops, as and for hops of like goodness and quality with the respective samples so as aforesaid shown to the plaintiff. Yet the defendant did not regard his said promise, but thereby deceived and defrauded the plaintiff in this, to wit, that the hops contained in the five pockets, respectively, so as aforesaid delivered to the plaintiff, at the time of the said delivery thereof were not all of like goodness and quality with the respective samples aforesaid, but on the contrary thereof the hops contained in each and every one of those five pockets were then all of greatly inferior goodness and quality to the respective samples so as aforesaid shown to the plaintiff, and were bad, damaged and unsalable; whereby the plaintiff lost the benefit of selling the same, etc., and gaining large profits, etc.

(State any special damage there may have been, as freight paid, insurance, etc.)

(Second count. Hops sold as good, etc.) And for that whereas also, on the day first aforesaid, in the county aforesaid, in consideration that the plaintiff would buy of the defendant, at his request, five other pockets of hops, at a certain price, to wit, — dollars, the defendant promised the plaintiff to deliver to him the last mentioned hops, and that the same should be good, sound and merchantable hops: And the plaintiff avers that thereupon he, confiding in that promise, then and there bought of the defendant the last mentioned hops, at the price aforesaid; and the defendant afterward, to wit, on, etc., there delivered to the plaintiff five pockets of hops, as and for good, sound and merchantable hops. Yet the defendant did not regard his promise last aforesaid, but thereby deceived and defrauded the plaintiff, in this, to wit, that the last mentioned hops, at the time of the said delivery thereof to the plaintiff, were not good, sound and merchantable hops, but on the contrary thereof were then and there bad, damaged and unmerchantable; whereby the plaintiff lost the benefit of selling the same, etc. *(as in first count).*

(Add the money counts, and conclude as in last precedent, No. 61.)

In the case from which the above precedent is drawn,¹ it was decided that when there is a latent defect in a commodity, unknown to the seller, and he sells with warranty of goodness equal to a sample, he is not liable on such warranty for any

¹ *Parkinson v. Lee*, 2 East 314.

damage resulting from such latent defect; nor will the law raise an implied promise, in such case, that the commodity is sound and merchantable, though a fair price is given for the same; since no fraud is imputable to the seller. In order to bind the seller, there should be an *express* warranty of the soundness.

It would seem preferable, in a count like the first in the above precedent, to allege that the defendant promised the plaintiff that the merchandise "should be of like goodness and quality with a certain sample then and there shown by the defendant to the plaintiff as and for a sample of" the merchandise sold.

The principal Illinois cases on the subject of warranty are noted below.¹

BY LANDLORD AGAINST TENANT.

No. 63. *Landlord against tenant from year to year, on implied contract to use farm in husbandlike manner, and according to custom of country.*

(Commence as in No. 36, ante, page 91.) For that whereas the defendant, on, etc., in the county aforesaid, was tenant to the plaintiff of a certain farm there situate, and in consideration thereof the defendant then and there promised the plaintiff to manage, use and cultivate the said farm, during the said tenancy, in a good and husbandlike manner, and according to the custom of the country where the said farm is so situate: And the plaintiff avers that the defendant there continued tenant to the plaintiff of the said farm, from the time of the making of his said promise until the — day of —, in the year 18— (or "hitherto"). Yet the defendant did not nor would, during the said tenancy, manage, use or cultivate the said farm in a good and husbandlike manner, and according to the custom of the country where the same is so situate; but on the contrary thereof, after the making of the said promise, and during the said tenancy, to wit,

¹ *England v. Clark*, 4 Scam. 486; *VanBuskirk v. Murden*, 22 Ill. 446; *Howard v. Cormick*, 24 Ill. 455; *Marckle v. Haskins*, 27 Ill. 382; *Applebee v. Rumery*, 28 Ill. 280; *Linton v. Porter*, 31 Ill. 107; *Kohl v. Lindley*, 39 Ill. 195; *Milk v. Moore*, 39 Ill. 584; *Schmidt v. Ins. Co.*, 41 Ill. 295; *Hanson v. Busse*, 45 Ill. 496; *Woodruff v. Thorne*, 49 Ill. 88; *Robinson v. McNeill*, 51 Ill. 225; *Osborn v. Flood*, 11 Bradw. 408; *Everingham v. Lord*, 19 Ill. App. 565; *Koerper v. Jung*, 33 Ill. App. 144; *Rumming v. Caldwell*, 43 Ill. App. 175; *Kingman v. Decker*, 43 Ill. App. 303; *Kemp v. Freeman*, 42 Ill. App. 500; *Miller v. Low*, 44 Ill. App. 630; *Kemp v. Miller*, 46 Ill. App. 213; *Aultman v. Witherow*, 48 Ill. App. 492; *Lanz v. Wachs*, 50 Ill. App. 262; *Aultman v. Wirth*, 54 Ill. App. 18; *Edwards v. Dillon*, 147 Ill. 14. See, also, cases cited in observations upon plea of breach of warranty, No. 126, post.

in the year 18— (or “ in the successive years 18— and 18—”), there wrongfully (*here state any act or omission complained of*), contrary to the course of good husbandry and the custom of the country where the said farm is situate as aforesaid, and contrary to the said promise of the defendant.

(*Second breach.*) And the plaintiff further says that the defendant, after the making of his said promise and during the said tenancy, did not nor would (*here state any other omission*), as the defendant, according to the course of good husbandry, ought to have done; but on the contrary thereof, the defendant during that time, to wit, on the day first aforesaid, and at divers other times between that day and the — day of — aforesaid, there wrongfully (*here state the act done in place of the act which ought to have been done*), contrary to the course of good husbandry and the custom of the said country, and contrary to the said promise of the defendant.

(*It may, in some cases, be advisable to add a second count, similar to the first, but leaving out what relates to the custom of the country; and also to insert a third count, stating the promise as in the first, and a general breach of good husbandry, without stating the particulars. Any special damage is of course to be averred; and if the plaintiff has been forced to expend money, add counts for money paid, etc. Conclude as in No. 61, ante.*)

No. 64. Against tenant for keeping and leaving premises out of repair.

(*Commence as in No. 36, ante, page 91.*) For that whereas on, etc., in, etc., in consideration that the plaintiff, at the request of the defendant, would let to the defendant a certain messuage, with the appurtenances, there situate, to hold the same to the defendant, as tenant thereof to the plaintiff, to wit, from the — day of — then next, for one whole year, and so from year to year, so long as the plaintiff and the defendant should respectively please, the defendant promised the plaintiff that he, the defendant, would, during the continuance of such tenancy, keep the said messuage, with the appurtenances, in tenantable repair, order and condition: And the plaintiff avers that thereupon he, confiding in the said promise of the defendant, on the day first aforesaid, there let the said messuage, with the appurtenances, to the defendant, for the time and upon the terms aforesaid, and that the defendant was tenant to the plaintiff of the said messuage, with the appurtenances, under and by virtue of the said letting, from the time of making his promise aforesaid until and upon the — day of, etc. Yet the defendant did not nor would, during the continuance of the said tenancy, keep the said messuage, with the appurtenances, in tenantable repair, order and condition; but on the contrary thereof, the defendant, during the continuance of his said tenancy, to wit, on the day first above mentioned, and from thence until and upon the said, etc., wrongfully suffered the said messuage, with the appurtenances, to be, and the same were, during all that time, ruinous, prostrate, foul and in untenable repair, order and condition, for want of needful repairing, cleansing and amending thereof; and on the day last aforesaid the defendant there delivered up to the plaintiff the said premises, so ruinous, prostrate, broken down, foul and in bad and untenable order, repair and condition as aforesaid, contrary to the said promise of the defendant.

ON PROMISES TO MARRY.

No. 65. On promise to marry on request.

(Commence as in No. 36, ante, page 91.) For that whereas on, etc., in, etc., in consideration that the plaintiff, being then unmarried, had then and there promised the defendant, at his request, to marry him, when she, the plaintiff, should be thereto requested, the defendant promised the plaintiff to marry her, when he should be thereto requested: And the plaintiff avers that she, confiding in the said promise of the defendant, has always from thence hitherto remained and still is unmarried, and has been for all the time aforesaid, and still is there ready and willing to marry him. Yet although the plaintiff, after the making of the said promise of the defendant, to wit, on the day aforesaid, there requested the defendant to marry her, the defendant did not nor would then, or at any time before or afterward, marry the plaintiff, but refuses so to do.

The above count is for not marrying on request. One or all of the following counts may be added, according to the circumstances.

No. 66. Count for marrying another woman.

For that whereas on, etc., in, etc., in consideration that the plaintiff, being then unmarried, had then and there promised the defendant, at his request, to marry him, when she, the plaintiff, should be thereunto requested, the defendant promised the plaintiff to marry her on request: And the plaintiff avers that she, confiding in the said promise of the defendant, has always from thence hitherto remained and still is unmarried. Yet the defendant, after the making of his said promise, to wit, on —, there wrongfully married a certain other person, to wit, one —, contrary to his last-mentioned promise.

No. 67. Count on promise to marry in a reasonable time.

And whereas also on, etc., in, etc., in consideration that the plaintiff, being then unmarried, had then and there promised the defendant, at his request, to marry him, the defendant promised the plaintiff to marry her within a reasonable time thereafter: And the plaintiff avers that, confiding in the last-mentioned promise of the defendant, she has always hitherto remained and still is unmarried, and there has been, during all the time last aforesaid, and still is, ready and willing to marry the defendant, whereof he has always there had notice. Yet although a reasonable time for the defendant to marry the plaintiff has elapsed since the making of the last-mentioned promise of the defendant, *and although the plaintiff, after the lapse of such reasonable time, to wit, on, etc., there requested the defendant to marry her*, he did not nor would, within such reasonable time as aforesaid, or when so requested as aforesaid, or at any other time, marry the plaintiff, but refuses so to do. *(It may be advisable to insert a count like this, leaving out the words in italics.)*

No. 68. *Count on promise to marry at a particular time.*

For that whereas on, etc., in etc., in consideration that the plaintiff, being then unmarried, had then and there promised the defendant, at his request, to marry him in the (*latter part of February next—state the time according to facts—*) he, the defendant, promised the plaintiff to marry her in (*the latter part of February then next*). And the plaintiff avers that she, confiding in the said promise, in (*the latter part of February next*) after the making thereof, and before and ever since, was and has been ready and willing to marry the defendant, whereof he then and there had notice. Yet the defendant did not nor would in (*the said latter part of February next*) after the making of his said promise, or at any time before or afterward, marry the plaintiff; and afterward, to wit, on, etc., he there wholly declined and refused to marry the plaintiff, and wholly discharged her from the performing of her said promise.

Where the promise is *special*, as “after the death of the defendant’s father,” it should be so declared on, with proper averments.¹ The action on a promise to marry is sustainable only when the contract is mutual.² An infant is not liable on his executory contract to marry.³ And though one of the parties is an infant, yet the contract is binding on the other side,⁴ and can be sustained by a man against a woman;⁵ but an executor can not sue.⁶ It is not necessary that the time of marriage should be specified to make the promise binding.⁷ If no definite time is fixed in law the contract is one to be performed in a reasonable time.⁸

If the promise was to marry on a particular day, it should be so described in one count of the declaration;⁹ but for fear the plaintiff should not be able to prove such particular promise, it is usual and better to add a count to marry on

¹ Peake, 103; Chitty on Contracts, 426.

² *King v. Kersey*, 2 Ind. 402; *Morgan v. Yurborough*, 5 La. An. 321; *Kelly v. Riley*, 106 Mass. 339; *Allard v. Smith*, 2 Metc. (Ky.), 297; *Wills v. Podgett*, 8 Barb. 324; *Homan v. Earle*, 53 N. Y. 267; *Conrad v. Williams*, 6 Hill 444; *Ellis v. Gugenheimer*, 20 Pa. St. 287; *Espy v. Jones*, 37 Ala. 379.

³ 1 Parsons on Cont. 544; *Holt v. Ward*, 2 Strange 937; *Hunt v. Peak*, 5 Cowen 475; *Willard v. Stone*, 7

Cowen 22; *Hamilton v. Lomax*, 26 Barb. 616; *McConkey v. Burnes*, 42 Ill. App. 511.

⁴ 2 Stra. 937; Bac. Abr., Infant; *Willard v. Stone*, 7 Cow. 22.

⁵ Carth. 467; 1 Salk. 24; 5 Mod. 511; *Kelly v. Renfro*, 9 Ala. 328.

⁶ 2 M. & S. 408; *Smith v. Sherman*, 4 Cush. 408; *Kelly v. Riley*, 106 Mass. 330; *Wade v. Kalbfleisch*, 50 N. Y. 282.

⁷ Carth. 467.

⁸ *Judy v. Sterrett*, 52 Ill. App. 265.

⁹ 2 Chit. Pl. 321, note m.

request, another to marry in a reasonable time, and another to marry generally.¹

Under a count to marry on request, positive proof of such request and refusal is never required. This may be inferred from circumstances, and especially from testimony showing a substantial refusal by the defendant. The request need not necessarily be made by the plaintiff herself. It may be made by her father, or other friend, whose authority to do so may be inferred from the relations existing between the parties.²

In an action for a breach of marriage contract, seduction of the plaintiff by the defendant, under promise of marriage, may be given in evidence in aggravation of damages.³ The reason for this rule of law is manifest. A party is always entitled to such damages as are the natural and proximate results of the act complained of.⁴ Whatever damages the plaintiff may have suffered in consequence of the defendant's refusal to marry her, she is legitimately entitled to recover in this action. And these damages are to be estimated from the circumstances of the parties, and the situation in which the plaintiff is left by the defendant's refusal to perform his contract.⁵

The rules applicable to contracts of marriage do not differ materially from those governing contracts in general. In both, the intention of the parties must be collected from the terms employed, whether the contract is verbal or in writing, and their rights and liabilities determined accordingly. In the case of mutual and dependent promises, neither can maintain an action without first showing a willingness and an offer to perform on his part, or that the other party has done some act dispensing with such offer.⁶ If the declaration is upon a promise to marry upon request, or in a reasonable time, the plaintiff must aver and prove a special request, or an offer to perform; a bare allegation of readiness and willingness is not

¹ 1 M. & P. 239; 2 Chit. Pl. 323.

² *Prescott v. Guyler*, 32 Ill. 312.

³ *Tubbs v. Van Kleeck*, 12 Ill. 446;

Burnett v. Simpkins, 24 Ill. 264;

Paul v. Frazier, 3 Mass. 72; *King v.*

Hersey, 2 Ind. 402; *Green v. Spencer*,

3 Mo. 318; *Whalen v. Layman*, 2

Blackf. 194.

⁴ 2 Greenl. Ev. 256; *Tubbs v. Van Kleeck*, 12 Ill. 446.

⁵ *Tubbs v. Van Kleeck*, 12 Ill. 446.

⁶ *Greenup v. Stoker*, 3 Gilm. 202;

Porter v. Rose, 12 Johns. 209; *Burks*

v. Shain, 2 Bibb. 341; 1 Chitty Pl.

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sufficient.¹ Where there is a general promise to marry, the law will imply that it is to be performed within a reasonable time.² If a man tells a woman's father that he does not intend to perform his matrimonial engagement to his daughter, it is sufficient for her to maintain her action.³ The promise to marry, the acceptance, or the request or refusal, may be proved by circumstances.⁴

In an action for a breach of promise of marriage, the defendant may prove particular acts of the plaintiff tending to show that she was an unchaste woman, if such acts and her character were unknown to him until after the making of the promise, but not otherwise,⁵ except in mitigation of damages;⁶ and to absolve the defendant, he must have terminated the engagement immediately upon being apprised of the facts.⁷ A promise of marriage made in consideration of sexual intercourse is void.⁸

It would seem that very slight facts and circumstances tending to prove misconduct, may be shown in mitigation of damages;⁹ but while this is true, and the defendant is entitled to offer, in *mitigation*, general rumor of bad character,¹⁰ yet he shall not *bar the action* without proof substantiating the charges; nor shall he be allowed to prove either general reputation or particular acts, if such reputation or acts were the result of his own fault.¹¹

Contracts of marriage may be inferred from unusual and marked attentions and continued intimacy, and those manifestations of attachment and regard which usually precede the consummation of such contracts.¹²

¹ *Greenup v. Stoker*, 3 Gilm. 202.

² *Blackburn v. Mann*, 85 Ill. 222; *Atchison v. Baker*, Peake Ad. Cas. 103; *Coil v. Wallace*, 24 N. J. L. 291; *Wagenseller v. Simmers*, 97 Pa. St. 465.

³ *Gough v. Farr*, 2 Car. & Payne, 631.

⁴ *Greenup v. Stoker*, 3 Gilm. 202; *Prescott v. Guyler*, 32 Ill. 312; *Rockafellow v. Newcomb*, 57 Ill. 186; *Blackburn v. Mann*, 85 Ill. 222; *Judy v. Sterrett*, 52 Ill. App. 265.

⁵ *Butler v. Eschleman*, 18 Ill. 44.

⁶ *Burnett v. Simpkins*, 24 Ill. 264; *Kantzler v. Grant*, 2 Bradw. 236; *Doubet v. Kirkman*, 15 Ill. App. 622.

⁷ *Burnett v. Simpkins*, 24 Ill. 264.

⁸ *Judy v. Sterrett*, 153 Ill. 94.

⁹ *Foulkes v. Selway*, 3 Esp. 236; *Willard v. Stone*, 7 Cow. 22; *Whar-ton v. Lewis*, 1 Car. & Payne 529.

¹⁰ *Baddeley v. Martlock*, 1 Holt. N. P. 1; *Foulkes v. Selway*, 3 Esp. 236;

¹¹ *Boynton v. Kellogg*, 3 Mass. 189.

¹² *Greenup v. Stoker*, 3 Gilm. 202.

AGAINST BAILEES.

No. 69. *Against hirer of horse, for using it improperly, and on a different journey, etc.*

(Commence as in No. 36, ante, page 91.) For that whereas on, etc., in the county aforesaid, in consideration that the plaintiff would let to hire and deliver to the defendant, at his request, a certain horse of the plaintiff, of the value of — dollars, for the defendant to go and perform a certain journey therewith, to wit, from, etc., to etc., and from thence back again to, etc., aforesaid, for certain reasonable reward to the plaintiff in that behalf, the defendant promised the plaintiff that he, the defendant, would not go or perform with the said horse any other journey than the one aforesaid, and that he would ride (or “drive”) and use the said horse in a moderate, careful, and proper manner: And the plaintiff avers that thereupon he, confiding in the said promise, then and there let to hire and delivered the said horse to the defendant, and the defendant then and there hired and received the same of the plaintiff, for the purpose, and upon the terms aforesaid. Yet the defendant, not regarding his said promise, thereupon, on the day aforesaid, went and performed with the said horse another journey than the one aforesaid, that is to say, a certain journey from, etc., aforesaid to, etc., aforesaid, and from thence to a certain place called —, in the county of —, and from thence back again to, etc., aforesaid; and in going and performing the last mentioned journey, the defendant so immoderately, carelessly, and improperly rode (or “drove”) and used the said horse, that by means of the several premises the said horse became and was greatly lamed and hurt, and so remained for a long time, to wit, hitherto, during all which time the plaintiff was deprived of the use and benefit of his said horse, and also thereby the said horse became and was greatly damaged and lessened in value.

(The second count is usually for riding the horse immoderately, and is as follows:)

And whereas also on, etc., in etc., in consideration that the plaintiff, at the request of the defendant, had let to hire and delivered to the defendant a certain other horse of the plaintiff, of the value of — dollars, to be by the defendant ridden and used, he, the defendant, promised the plaintiff to ride and use the last mentioned horse in a moderate, careful and proper manner. And although the defendant then and there received the last mentioned horse of the plaintiff, for the purpose last aforesaid, yet the defendant, not regarding his last mentioned promise, did not nor would ride or use the last mentioned horse in a moderate, careful or proper manner; but on the contrary thereof, the defendant, after the making of his last mentioned promise, to wit, on the day aforesaid, there so carelessly and improperly rode and used the last mentioned horse that by means thereof the same became and was greatly lamed and hurt, and so remained for a long space of time, to wit, hitherto, during all which time the plaintiff thereby was deprived of the use and benefit of his last mentioned horse, and also thereby the same horse became and was greatly damaged and lessened in value.

(If there is any doubt whether the injury was occasioned by improper riding or driving, it is advisable to add a count like the last, but stating the defendant's promise to have been "that whilst he should so have the use of the last mentioned horse, as aforesaid, he would take due and proper care thereof," and averring "that the defendant had the use, etc., and that whilst he so had the use, etc., he did not take due and proper care thereof, but wholly neglected so to do; and by reason thereof the last-mentioned horse, on, etc., there became and was greatly damaged," etc. It may also be advisable to add another count, stating, "that whereas on, etc., in, etc., in consideration that the plaintiff had delivered to the defendant, at his request, a certain other horse, to be had and used by the defendant"—omitting the statement as to hire—"the defendant promised," etc., stating the promise as in the count last suggested. If there is any demand for horse-hire, add a count therefor, as ante, under No. 25, and the account stated.¹ Conclude as follows:)

Wherefore the plaintiff says that he is injured and has sustained damage to the amount of — dollars, and therefore he brings his suit, etc.

A hirer is not bound to exercise more than ordinary care with the thing let to hire,² but a borrower is bound to use extraordinary care.³ The use of domestic animals necessarily involves their keeping, and the expense incurred by the borrower for such keeping is not a compensation to the lender which makes the bailment one of hiring.⁴

The hirer of a horse is not liable to make compensation for his death, occasioned by error of a farrier called in, but is liable if he, the hirer, imprudently gave medicine himself; nor is the hirer liable for a horse's falling, etc., without the hirer's fault.⁵ He must not ride a horse after it is exhausted and refuses its feed.⁶

The burden is on the bailee of an animal received in good and returned in bad condition, to show how the change happened.⁷ An agister of cattle for hire is liable for the negligence of his servants, but not for their willful or malicious acts, committed without his knowledge.⁸

¹ 2 Chit. Pl. 337, 339.

² *Ld. Raym* 916; *Bul. N. P.* 72; *Jones*, 89; *Metcalf v. Hess*, 14 Ill. 129; *Halty v. Markel*, 44 Ill. 225.

³ *Phillips v. Conden*, 14 Ill. 84; *Howard v. Babcock*, 21 Ill. 259; *Bennett v. O'Brien*, 37 Ill. 250.

⁴ *Howard v. Babcock*, 21 Ill. 259; *Bennett v. O'Brien*, 37 Ill. 250.

⁵ 3 Camp. 5.

⁶ *Gow, C. N. P.* 1.

⁷ *Burlingame v. Horne*, 30 Ill. App. 332.

⁸ *Halty v. Markel*, 44 Ill. 225.

No. 70. Against carrier by land, for loss of goods.

(Commence as in No. 36, ante, page 31.) For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was a common carrier of goods and chattels for hire, in and by a certain wagon, from — to —; and the defendant being such carrier as aforesaid, the plaintiff, on, etc., at, etc., at the request of the defendant, caused to be delivered to him certain goods and chattels of the plaintiff, to wit, etc., (*describe them, as in trover,*) of the value of — dollars, to be taken care of and safely carried by the defendant, as such carrier as aforesaid, in and by the said wagon, from, etc., aforesaid, to, etc., aforesaid, and at the last named place to be safely delivered by the defendant for the plaintiff: and in consideration thereof, and of certain reward to the defendant in that behalf, he, the defendant, on the day aforesaid, in the county aforesaid, promised the plaintiff to take care of the said goods and chattels, and safely to carry the same, in and by the said wagon, from, etc., aforesaid to, etc., aforesaid, and at the last named place safely to deliver the same for the plaintiff. And although the defendant, as such carrier as aforesaid, then received the said goods and chattels, at the place first aforesaid, for the purpose aforesaid, yet not regarding his said promise, he has not taken care of the said goods and chattels, or safely carried the same from, etc., aforesaid, to, etc., aforesaid, nor has at the last mentioned place safely delivered the same for the plaintiff; but on the contrary thereof, the defendant so carelessly behaved himself with respect to the said goods and chattels, that by and through the mere negligence and improper conduct of the defendant and his servants in this behalf, (*) the said goods and chattels afterward, to wit, on the day aforesaid, became and were wholly lost to the plaintiff.

(If only a part of the goods was lost, proceed from the asterisk in this count as follows: "divers of the said goods and chattels, to wit, etc., of the value of, etc., were on the day aforesaid wholly lost to the plaintiff"—and, if according to the fact—"and divers others thereof, to wit, etc., of the value of, etc., were then greatly damaged, and lessened in value to the amount of, etc.," or "the residue thereof was then greatly damaged, etc." Or see averment of partial loss in the following form, No. 71.)

(Second count, for not carrying within a reasonable time.) And for that whereas also, on the day aforesaid, at, etc., aforesaid, in consideration that the plaintiff had then and there caused to be delivered to the defendant, at his request, divers other goods and chattels of the plaintiff, to wit, etc., of the value of — dollars, to be taken care of and safely carried by the defendant from, etc., aforesaid to, etc., aforesaid, and at the last mentioned place to be by him delivered for the plaintiff, for certain reward to the defendant in that behalf, he, the defendant, promised the plaintiff to take care of the last mentioned goods and chattels, and safely to carry the same from, etc., aforesaid to, etc., aforesaid, and at the last mentioned place to deliver the same for the plaintiff, in a reasonable time then next following. And although the defendant then received the last mentioned goods and chattels, at the place first aforesaid, for the purpose aforesaid, and although a reasonable time for the carriage and delivery thereof as aforesaid has

long since elapsed, yet the defendant did not nor would within such reasonable time, or afterward, though often requested, safely carry the last mentioned goods and chattels from, etc., aforesaid to, etc., aforesaid, or at the last named place deliver the same for the plaintiff, but has hitherto wholly neglected so to do; whereby the last mentioned goods and chattels have been and are wholly lost to the plaintiff.

(Add counts for money had and received, and upon an account stated, and conclude as in No. 61 or No. 69.)

No. 71. *Against the captain of a ship, on his bill of lading, for loss of goods.*

(Commence as in No. 36, ante, page 91.) For that whereas the defendant, before and at the time of the making of his promise hereinafter next mentioned, was the master of a certain vessel called the —, then at, etc., and bound from thence to, etc.; and the plaintiff, on, etc., at, etc., aforesaid, at the request of the defendant, caused to be shipped on board of the said vessel divers goods and chattels, to wit, etc., *then in good order and well conditioned*, of the value of — dollars, to be taken care of and safely carried by the defendant, on board of the said vessel, from, etc., aforesaid, to, etc., aforesaid, and at the last mentioned place to be safely delivered, *in the like good order and well conditioned*, for the plaintiff *(the dangers of navigation only excepted)*; and in consideration thereof, and of certain reward to the defendant in that behalf, he, the defendant, thereupon, on the day and in the county aforesaid, promised the plaintiff to take care of and safely carry and deliver the said goods and chattels as aforesaid *(the dangers of navigation only excepted)*: And although the defendant, so being such master of the said vessel as aforesaid, then and there received the said goods and chattels, to be carried and delivered as aforesaid, and although a reasonable time for the carrying and delivering of the same as aforesaid has long since elapsed, and the defendant has delivered for the plaintiff, at, etc., aforesaid, a part of the said goods and chattels, to wit, etc.; yet the defendant, not regarding his said promise, did not nor would take care of and safely carry the residue of the said goods and chattels from, etc., aforesaid, to, etc., aforesaid, and at the last mentioned place safely deliver the same for the plaintiff *(although no dangers of navigation did prevent the defendant from so doing)*; but on the contrary thereof, the defendant, so being such master of the said vessel as aforesaid, so carelessly behaved himself with respect to the said residue of the said goods and chattels, that on the day aforesaid, by and through the mere negligence and improper conduct of the defendant and his servants in that behalf, the said residue of the said goods and chattels, being of the value of — dollars, became and was wholly lost to the plaintiff.

(The words in italics, in the above count, will be inserted, or omitted, or varied, according to the terms of the bill of lading.)

(Second count.) And for that whereas also, on the day aforesaid, at, etc., aforesaid, in consideration that the plaintiff had then and there delivered to the defendant, at his request, divers other goods and chattels, to wit, etc., of the value of, etc., to be taken care of and safely carried by the defendant on board of a certain other vessel, from, etc., aforesaid, to, etc., aforesaid, and

at the last named place to be safely delivered for the plaintiff, for certain reward to the defendant in that behalf, he, the defendant, promised the plaintiff to take due care of the last mentioned goods and chattels whilst he should have the care and custody thereof for the purpose aforesaid : And although the defendant, on the day aforesaid, at, etc., aforesaid, received the last mentioned goods and chattels, for the purpose aforesaid, yet, not regarding his last mentioned promise, he took so little and such bad care of those goods and chattels, whilst he had the care and custody thereof for the purpose aforesaid, that on the day aforesaid, by and through the mere negligence of the defendant in that behalf, the same became and were wholly lost to the plaintiff.

(Conclude as in No. 69, ante.)

It does not appear to be necessary, in assumpsit, to commence with an inducement of the defendant's being a common carrier, or of the nature of the conveyance, but the declaration will suffice if it merely states the delivery to the defendant of the goods, etc., to be carried from, etc., to, etc., and his undertaking to carry them accordingly.¹

The places to and from which the goods were to be carried must be stated accurately.² An exact description of the goods is not material;³ nor is it necessary to state the amount of the reward paid, or to be paid, for the carriage of the goods.⁴ In general, the consignee of the goods should be the plaintiff;⁵ but if the consignee had no property in the goods at the time of the delivery thereof to the carrier, the consignor must sue.⁶

In an action on the case, however, the consignor, though only a bailee, may sue, and so may the real owner, and so may the consignee, but the first recovery of damages is a bar to any other.⁷ And the consignor may control the destination of property *in transitu*, and the carrier is bound to obey his directions in that regard.⁸

¹ 1 Wils. 281; Bac. Abr., tit. Carrier, A.

² *Tucker v. Clarklin*, 2 Stark 385.

³ 2 Saund. 74 a.

⁴ *Andrews v. Whitehead*, 13 East. 114, note a; 2 New Rep. 458; *Dalston v. Janson*, 3 Ld. Raym. 115.

⁵ *Dawes v. Peck*, 8 T. R. 330.

⁶ *Sargent v. Morris*, 3 B. & A. 277; *Potter v. Lansing*, 1 Johns. 223;

Raymond v. Howland, 12 Wend. 176; *Everett v. Saltus*, 15 Wend. 474.

⁷ *R. R. Co. v. McComas*, 33 Ill. 185; *M. D. T. Co. v. Smith*, 76 Ill. 542; *R. R. Co. v. Emrich*, 24 Ill. App. 245; *R. R. Co. v. Miller*, 32 Ill. App. 259.

⁸ *Lewis v. R. R. Co.*, 40 Ill. 281; *Strahorn v. Trans. Co.*, 43 Ill. 424.

The carrier has two distinct liabilities: *First*, for losses by accident and mistake, where he is liable as insurer. *Second*, for losses by default or negligence, where he is answerable as an ordinary bailee.¹ It is provided by the statute of Illinois, that "whenever any property is received by any railroad corporation to be transported from one place to another, within or without this state, it shall not be lawful for such corporation to limit its common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for the safe delivery of such property."²

The statute does not prohibit common carriers from limiting their common law liability by contract with the owner of the property delivered for transportation. It only prohibits the limitation of the carrier's liability by a stipulation or clause expressed in the receipt given for the property.

A railway carrier, in many respects may, by express contract, limit its strict common law liability. It may, by special contract, limit its liability to such damage or loss as may occur on its own line of carriage; and against loss by fire without its fault; and its liability may thus be limited as an insurer, and against other loss not attributable to its negligence or that of its servants; and it may require the value of goods offered for transportation to be fixed by the shipper, to protect itself against fraud in case of loss.

But in this state a common carrier can not, even by express contract, exempt itself from liability resulting from gross negligence or willful misconduct committed by itself, or its servants or employes; nor can it limit its liability in amount, as against damages resulting from such negligence.³ The mere

¹ *Boscowitz v. Am. Ex. Co.*, 93 Ill. 523.

² 2 Starr & Curtis 1945; Rev. Stat. (1893), 1121; Rev. Stat. (1895), 1205.

³ *R. R. Co. v. Chapman*, 133 Ill. 96; *Coles v. R. R. Co.*, 41 Ill. App. 607; *R. R. Co. v. Jaggerman*, 115 Ill. 407; *R. R. Co. v. Brown*, 51 Ill. App. 656; *Ex. Co. v. Stettaners*, 61 Ill. 184; *R. R. Co. v. Wilcox*, 84 Ill.

239; *R. R. Co. v. Hale*, 2 Bradw. 150; *R. R. Co. v. Harmon*, 12 Bradw. 54; *R. R. Co. v. Morrison*, 19 Ill. 136; *R. R. Co. v. Read*, 37 Ill. 485; *R. R. Co. v. Adams*, 42 Ill. 474; *R. R. Co. v. Owens*, 53 Ill. 391; *R. R. Co. v. Hall*, 58 Ill. 409; *R. R. Co. v. Montfort*, 60 Ill. 175; *Arnold v. R. R. Co.*, 83 Ill. 273; *R. R. Co. v. Beggs*, 85 Ill. 80.

acceptance of a bill of lading or receipt, which contains conditions restricting the carrier's liability, raises no presumption of assent to its terms.¹

The adjudications on the subject of common carriers are too numerous to permit even a summary of them in a work of this kind. The principal cases in the supreme and appellate courts of Illinois relating to the duties and rights of carriers of goods,² money,³ baggage,⁴ and passengers,⁵ and not hereinbefore cited, are noted below.

¹ Lawrence on Carriers, Sec. 104, p. 411; *R. R. Co. v. Herndon*, 81 Ill. 143; *Ex. Co. v. Haynes*, 42 Ill. 89; *Express v. Stettaners*, 61 Ill. 184; *R. R. Co. v. Wilcox*, 84 Ill. 239; *Trans. Co. v. Thielbar*, 86 Ill. 71; *Trans. Co. v. Leyson*, 89 Ill. 43; *Trustees v. Mesenheimer*, 89 Ill. 151; *Ex. Co. v. Spelman*, 90 Ill. 455; *Trans. Co. v. Dater*, 91 Ill. 195; *W. T. Co. v. Hosking*, 19 Bradw. 607; *M. D. T. Co. v. Furthmann*, 149 Ill. 66; *R. R. Co. v. Jaggerman*, 115 Ill. 407.

² *Trans. Co. v. Joesting*, 89 Ill. 152; *R. R. Co. v. Erickson*, 91 Ill. 613; *Tr. Co. v. Moore*, 88 Ill. 136; *R. R. Co. v. Johnson*, 34 Ill. 389; *R. R. Co. v. Smyser*, 38 Ill. 355; *Am. Ex. Co. v. Lesem*, 39 Ill. 312; *R. R. Co. v. Montgomery*, 39 Ill. 335; *R. R. Co. v. Ames*, 40 Ill. 249; *I. C. R. R. v. Waters*, 41 Ill. 73; *Baker v. R. R. Co.*, 42 Ill. 73; *R. R. Co. v. Scott*, 42 Ill. 132; *R. R. Co. v. Cobb*, 48 Ill. 402; *Marshall v. Railroad*, 48 Ill. 425; *Vincent v. R. R. Co.*, 49 Ill. 33; *Railroad v. Merrill*, 52 Ill. 123; *N. T. Co. v. Sellick*, 52 Ill. 249; *R. R. Co. v. McClellan*, 54 Ill. 58; *R. R. Co. v. Frankenberger*, 54 Ill. 88; *Ry. Co. v. Gilvin*, 81 Ill. 511; *Express Co. v. Greenhalgh*, 80 Ill. 68; *Coles v. R. R. Co.*, 41 Ill. App. 609; *R. R. Co. v. People*, 19 Ill. App. 141; *R. R. Co. v. Davis*, 54 Ill. App. 130; *Express Co. v. Weltstein*, 28 Ill.

App. 101; *Shearer v. Ex. Co.*, 43 Ill. App. 641.

³ *Baldwin v. Am. Express Co.*, 23 Ill. 197; *I. C. R. R. Co. v. Copeland*, 24 Ill. 332; *Express Co. v. Baldwin*, 26 Ill. 504; *Express Co. v. Haggard*, 37 Ill. 465; *Gulliver v. Express Co.*, 38 Ill. 503; *Ten Eyck v. Harris*, 47 Ill. 268.

⁴ *Wood v. Devin*, 13 Ill. 746; *Parmelee v. McNulty*, 19 Ill. 556; *Parmelee v. Smith*, 21 Ill. 620; *Railroad v. Meyers*, 21 Ill. 627; *Parmelee v. Fischer*, 22 Ill. 212; *Davis v. Railroad*, 22 Ill. 278; *I. C. R. R. v. Copeland*, 24 Ill. 332; *R. R. Co. v. Fahey*, 52 Ill. 81; *Bartholomew v. R. R. Co.*, 53 Ill. 227; *R. R. Co. v. Collins*, 56 Ill. 212; *R. R. Co. v. Oehm*, 56 Ill. 293; *R. R. Co. v. Carrow*, 73 Ill. 348; *R. R. Co. v. Boyce*, 73 Ill. 510; *Parmelee v. Lowitz*, 74 Ill. 116; *R. R. Co. v. Clayton*, 78 Ill. 616; *Ry. Co. v. Hardway*, 17 Ill. App. 323; *R. R. Co. v. Addizoat*, 17 Ill. App. 635; *Rice v. R. R. Co.*, 22 Ill. App. 643; *Parmelee v. Raymond*, 43 Ill. App. 609; *Packet Co. v. Gattman*, 127 Ill. 610.

⁵ *Frink v. Potter*, 17 Ill. 406; *R. R. Co. v. Yarwood*, 17 Ill. 509; *Frink v. Schroyer*, 18 Ill. 416; *C. B. & Q. v. George*, 19 Ill. 510; *R. R. Co. v. Muhling*, 30 Ill. 9; *R. R. Co. v. Apperson*, 49 Ill. 480; *Packet Co. v. Henry*, 50 Ill. 264; *I. C. R. R. Co. v. Cox*, 21 Ill. 20; *Moss v. Johnson*, 22

ON CONTRACTS OF SALE OF GOODS.

No. 72. For not accepting goods sold.

(Commence as in No. 36, ante, page 91.) For that whereas on, etc., in, etc., the defendant bargained for and bought of the plaintiff, and the plaintiff then and there sold to the defendant, at his request, a large quantity, to wit, — — bushels of wheat, at the price of — — for each bushel thereof, to be delivered by the plaintiff to the defendant in a week then next following, at —, and to be paid for by the defendant to the plaintiff on the delivery thereof as aforesaid; and in consideration thereof, and that the plaintiff had promised the defendant, at his request, to deliver the said wheat to him in the time and at the place aforesaid, the defendant thereupon, on the day *first* aforesaid, in the county aforesaid, promised the plaintiff to accept the said wheat from him, and to pay him for the same on the delivery thereof as aforesaid: And although the plaintiff, within a week next after the making of the said promise of the defendant, to wit, on, etc., at, etc., aforesaid, was ready and willing, and tendered and offered to deliver the said wheat to the defendant, and then and there requested him to accept the same, and to pay therefor as aforesaid, yet the defendant did not nor would then, or at any time before or afterward, accept the said wheat, or any part thereof, from the plaintiff, or pay him for the same as aforesaid, but refused so to do.

(If the plaintiff was not to deliver the goods at any particular time and place, then state the contract accordingly; and if the goods have been resold at a loss, or any expense has been incurred, state the special damage. Add a count for goods bargained and sold, under which count the plaintiff may in general recover.)

The damages, in an action for not accepting goods at an agreed time, place and price, will be the difference between that price and the market value of the goods at the time and place so fixed.¹ The vendor may resell the goods and charge

Ill. 633; *Tuller v. Talbot*, 23 Ill. 257; *R. R. Co. v. Hazzard*, 26 Ill. 373; *R. R. Co. v. Pondrom*, 51 Ill. 333; *Quinn v. R. R. Co.*, 51 Ill. 495; *R. R. Co. v. Baddeley*, 54 Ill. 20; *R. R. Co. v. Phillips*, 55 Ill. 194; *Id. v. Michie*, 83 Ill. 427; *Id. v. Dunn*, 61 Ill. 385; *Id. v. Thompson*, 56 Ill. 138; *Id. v. Wilson*, 63 Ill. 167; *Id. v. Stratton*, 78 Ill. 88; *Packet Co. v. True*, 88 Ill. 608; *R. R. Co. v. Flexman*, 9 Bradw. 250; *Id. v. Rector*, 104 Ill. 296; *Lamert v. R. R. Co.*, 9 Bradw. 388; *Id. v. Shacklet*, 105 Ill. 364; *Id. v.*

Engel, 35 Ill. App. 491; *Id. v. Cook*, 145 Ill. 553; *Id. v. Barrett*, 16 Ill. App. 23; *Id. v. Pillsbury*, 123 Ill. 21; *Id. v. Brown*, 123 Ill. 173; *Id. v. Elder*, 50 Ill. App. 273; *Id. v. Coit*, 50 Ill. App. 640; *Id. v. Lewis*, 48 Ill. App. 274; *Id. v. Williams*, 140 Ill. 275; *Id. v. Cotton*, 140 Ill. 486; *Id. v. Arnol*, 144 Ill. 261; *Lavis v. R. R. Co.*, 54 Ill. App. 637.

¹ *Smith v. Dunlap*, 12 Ill. 184; *Phelps v. McGee*, 18 Ill. 155; *Strawn v. Cogswell*, 28 Ill. 457; *Lassen v. Mitchell*, 41 Ill. 101; *Sleuter v. Wall-*

the vendee with the difference between the contract price and that realized at the sale.¹

No. 73. For not accepting goods made for defendant.

(Commence as in No. 36, ante, page 91.) For that whereas, on, etc., in, etc., in consideration that the plaintiff would make for the defendant, at his request, — —, at the price of — —, (or, if no price was named, say, "at a reasonable price for the same,") and would deliver to him the said —, when the same should be made (if there were any terms as to the time or place of delivery, state them accordingly), he, the defendant, promised the plaintiff to accept of him the said —, when the same should be so made, and to pay him the said price for the same on the delivery thereof as aforesaid; and the plaintiff avers that he did afterward, to wit, on, etc., there make the said — for the defendant, and thereupon then and there was ready and willing, and offered to deliver the same to him, and requested him to accept and pay for the same as aforesaid. Yet the defendant did not nor would then, or at any other time, accept of the plaintiff the said —, or pay him therefor the price aforesaid, or any part thereof, but refuses so to do.

(Counts may be added for goods bargained and sold, work and materials, money paid, and account stated, with conclusion as in No. 61.)

No. 74. For not delivering goods within a specified time, etc.

(Commence as in No. 36, ante, page 91.) For that whereas on, etc., in, etc., the plaintiff, at the request of the defendant, bargained with the defendant to buy of him, and the defendant then and there sold to the plaintiff, a large quantity, to wit, — bushels of wheat, at the price of — — for each bushel thereof, to be delivered by the defendant to the plaintiff in a week then next following, at —, and to be paid for by the plaintiff to the defendant on the delivery thereof as aforesaid; and in consideration thereof, and that the plaintiff had promised the defendant, at his request, to accept and receive the said wheat, and to pay him for the same at the price aforesaid, he, the defendant, on the day first aforesaid, in the county aforesaid, promised the plaintiff to deliver the said wheat to him as aforesaid: And although the said time for the delivery of the said wheat has long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said wheat, and to pay for the same at the price aforesaid, to wit, at, etc., aforesaid, yet the defendant did not nor would, within the time aforesaid or afterward, deliver the said wheat, or any part thereof, to the plaintiff, at, etc., aforesaid, or elsewhere, but refused so to do; whereby the plaintiff has been deprived of divers great gains and profits which otherwise would have accrued to him from the delivery of the said wheat to him as aforesaid.

(One or more counts, varying the statement, may be added, and such common counts as the circumstances may require.)

baum, 45 Ill. 43; *Saladin v. Mitchell*, Ill. 446; *Coal Co. v. Smelting Co.*, 45 Ill. 79; *McNaught v. Dodson*, 49 53 Ill. App. 565.

¹ *Rochling v. Lock Co.*, 130 Ill. 670.

Where the contract is to deliver generally, and not in any named time, a special request to deliver must be averred,¹ or else it must be shown that the defendant has put it out of his power to deliver the goods, as by his having resold them, or the like.² Where two acts are to be done at the same time, as selling and delivering, and receiving and paying, in an action for non-delivery it is only necessary for the plaintiff to aver and prove a readiness to pay, whether the other party was at the place, ready to deliver, or not.³

No. 75. For not delivering goods at a particular place, etc.

(Commence as in No. 36, ante, page 91.) For that whereas on, etc., in, etc., the plaintiff, at the request of the defendant, bargained for and agreed to buy of the defendant a large quantity, to wit, — bushels, of oats, upon the following terms, that is to say, that (*here set out the terms of the contract, which may be thus:*) “such oats should be of fair quality and color, and of the weight of — pounds per bushel, and should be delivered for the plaintiff within a reasonable time thereafter, free of expense to him, on board some — boat in the river —, to be conveyed in such boat from thence to —, at a freight not exceeding — cents per bushel, and that the plaintiff should pay the defendant for such oats at the rate of — cents for each bushel thereof;” and thereupon, in consideration of the premises, and that the plaintiff had promised the defendant, at his request, to accept a delivery and shipment of such oats as aforesaid, and to pay him for the same at the rate in that behalf aforesaid, the defendant, on the day aforesaid, in, etc., aforesaid, promised the plaintiff that he, the defendant, would within a reasonable time then next following procure to be delivered and shipped for the plaintiff, in manner aforesaid, the said quantity of oats, of such quality, color and weight as aforesaid, to be so conveyed as aforesaid: And although a reasonable time for that purpose has long since elapsed, and the plaintiff was always during and since that time there ready and willing to accept a delivery and shipment of such oats as aforesaid, and to pay for the same as aforesaid, whereof the defendant then had notice, yet the defendant (though often thereto requested) did not nor would, within such reasonable time or afterward, procure to be delivered or shipped for the plaintiff, in manner aforesaid or otherwise, the said quantity of oats, of such quality, color and weight as aforesaid, or any oats whatsoever, but refused and still refuses so to do; by means whereof the plaintiff has been deprived of great gains and profits which he might and otherwise would have acquired by reselling such oats at much higher prices.

(*Special and common counts may be added, as in No. 74.*)

¹ *Bach v. Owen*, 5 T. R. 409; *Wood v. Dial*, 12 Ill. 72.

³ *Funk v. Hough*, 29 Ill. 145; *Hough v. Rawson*, 17 Ill. 588.

² *Amory v. Brodrick*, 5 B. & Ald. 712.

It would seem safer, in a count like the above, to aver a special request, but the precedents in the books of forms do not contain that averment.¹

ON POLICIES OF INSURANCE.

No. 76. On a fire insurance policy, renewed.

(*After stating the court, term, and venue:*) A. B., plaintiff, by C. D., his attorney, complains of the — Insurance Company, defendant, of a plea of trespass on the case on promises: For that, whereas the defendant, on, etc., in, etc., made its policy of insurance, and delivered the same to the plaintiff, and thereby then and there, in consideration of — dollars, to it paid by the plaintiff, did insure the plaintiff against loss or damage by fire, to the amount of — dollars, on (*here describe the property on which the insurance was effected.*) And the defendant, for the consideration aforesaid, did by the said policy promise and agree to make good and satisfy unto the plaintiff, his executors, administrators or assigns, all such loss or damage, not exceeding the said sum of — dollars, as should happen by fire to the said property whereon the said insurance was so made as aforesaid, from, etc., at noon, until, etc., at noon, such loss or damage to be estimated according to the true and actual value of the said property at the time such loss or damage should happen, and the amount thereof to be paid within — days after notice and proof of such loss or damage should be made by the plaintiff, in conformity to the conditions annexed to the said policy; provided, always, and it was by the said policy declared, that the defendant should not be liable to make good any loss or damage which might happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and that in case the plaintiff had effected any other insurance against loss by fire on the said property, not notified to the defendant and indorsed on the said policy, then the said policy should be void; and that if the plaintiff, or his executors, administrators, or assigns, should thereafter effect any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the defendant, and have the same indorsed on the said policy, or otherwise acknowledged by the defendant in writing, the said policy should cease, and be of no further effect; and that in case of any other insurance on the same property, whether prior or subsequent to the date of the said policy, the plaintiff should not, in the event of loss or damage of the said property, be entitled to demand or recover of the defendant, on the said policy, any greater proportion of such loss or damage than the said amount by the said policy insured should bear to the whole amount of insurance on the said property; and that in case the building in the said policy mentioned should, at any time whilst the said policy would otherwise continue in force, be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous, or specified in the memorandum of special rates in the

¹ 2 Chit. Pl. 270; 1 Swan's Pr. 327.

conditions annexed to the said policy, or for the purpose of storing therein any of the articles, goods or merchandise in the same conditions denominated hazardous, or extra-hazardous, or included in the said memorandum of special rates, unless in the said policy otherwise specially provided, or thereafter agreed to by the defendant in writing, added to or indorsed on the said policy, then and from thenceforth, so long as the same building should be so appropriated, applied or used, the said policy should cease, and be of no force or effect; and that the said insurance so witnessed by the said policy was not intended to apply to or cover any books of account, written securities, deeds or other evidences of title to land, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that the said policy was made and accepted with reference to the said conditions thereto annexed, which were to be used and resorted to in order to explain the rights and obligations of the said parties to the said policy, in all cases not therein otherwise specially provided for, and that the same insurance (the risk not being changed) might be continued for such further term as might be agreed upon, on payment of the premium therefor, and indorsement of such payment on the said policy, or receipt given for the same; and that the interest of the plaintiff in the said policy was not assignable, unless by consent of the defendant, manifested in writing; and that in case of any transfer or termination of the interest of the plaintiff in the said property, either by sale or otherwise, without such consent, the said policy should thenceforth be void. And the plaintiff avers that the said conditions in the said policy mentioned are as follows, that is to say: (*here insert, verbatim, the conditions, or such parts thereof as constitute a condition precedent.*)

And the plaintiff further avers that afterward, to wit, on, etc., in, etc., in consideration of the payment of the further sum of — dollars, then and there made by the plaintiff to the defendant, *the receipt whereof was by the defendant then and there acknowledged in writing*, and indorsed on the said policy, the defendant continued the said insurance for the further term of, etc., then and there agreed upon between the plaintiff and the defendant, to wit, from the day last aforesaid, at noon, until, etc., at noon. And thereupon, on, etc., aforesaid, in consideration of the premises, and that the plaintiff had promised the defendant to keep and perform all things in the said policy contained on the part of the plaintiff to be kept and performed, the defendant there promised the plaintiff that it would keep and perform all things in the said policy mentioned on its part to be kept and performed and the defendant then and there became and was an insurer to the plaintiff of the said sum of, etc., upon the said property as aforesaid. And the plaintiff further avers (*) that at the time of the making of the said policy, and from thence until the happening of the loss and damage hereinafter mentioned, he had an interest in the said property to the amount of the said sum so by the defendant insured thereon as aforesaid. And the plaintiff further avers that on, etc., the said property was consumed and destroyed by fire, whereby the plaintiff then and there sustained loss and damage on the said property to the amount of the sum last aforesaid, which said loss and damage did not happen by means of any invasion, insurrection,

riot or civil commotion, or of any military or usurped power. And the plaintiff further avers that forthwith after the happening of the said loss and damage, to wit, on, etc., he there gave notice thereof to the defendant, and as soon thereafter as possible, to wit, on, etc., there delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit; which said account was signed by the plaintiff, and accompanied by his oath that the same was in all respects just and true, and showed the value of the said property, and in what general manner the said building was occupied at the time of the happening of the said loss and damage, and the name of the person then in the actual possession thereof (or "in charge thereof, there being no person in the actual possession of the same"), and when and how the said fire originated, so far as the plaintiff knew or believed, and his interest in the said property at that time; to which said account was annexed, and therewith delivered, a certificate under the hand and seal of the notary public nearest to the place of the said fire, to wit, E. F., showing that he, the said notary, had examined the circumstances attending the said fire, and the loss and damage alleged, and was acquainted with the character and circumstances of the plaintiff, and verily believed that the plaintiff had by misfortune, and without fraud or evil practice, sustained loss and damage on the said property to the amount of — dollars. And the plaintiff further avers that there was not at or since the time of the making of the said policy (or "the continuance of the said insurance as aforesaid") any other insurance on the said property; and that the said building was not at or since that time appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous, or specified in the said memorandum of special rates, or for the purpose of storing therein any of the articles, goods or merchandise in said conditions denominated hazardous or extra-hazardous, or included in the said memorandum of special rates (*except as specially provided in the said policy as aforesaid, etc.*) (*) And the plaintiff further avers that although he has kept and performed all things in the said policy contained on his part to be kept and performed, and although he has sustained loss and damage by fire on the said property, in the manner and to the amount aforesaid, nevertheless the defendant, though often thereto requested, has not yet paid to the plaintiff that amount, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc. (*If more than one count, the conclusion will be as in No. 61, ante.*)

Policies of insurance vary so greatly in their forms and provisions, that the precedents given are only to be considered as indicating the general structure of the declaration. As to the necessity of the averment of interest in the plaintiff, see the authorities mentioned in the note.¹

¹ 2 Chit Pl., 2 Am. Ed., 181, note k, 223; *Ins. Co. v. Mfg. Co.*, 1 Gilm and cases cited; *Id.*, 11 Am. Ed. 181 236; *Ins. Co. v. Wetmore*, 32 Ill. 221. note m, and cases cited; Ol. Prec.

Where a term of insurance about to expire is continued, and a renewal receipt given, such receipt does not constitute a new contract of insurance, but merely continues the policy in force for another term; and if a loss occurs during the new term, a recovery must be had, if at all, on the original contract.¹ And this is the case, though the new premium was paid by the assignee, and the renewal receipt was given to him.² It seems it is otherwise, however, where a receipt is given renewing a policy that has expired.³

A policy of insurance is not assignable, so as to enable the assignee to sue in his own name;⁴ but where the assignee of a policy has taken a renewal receipt to himself and has paid the new premium, he can, in case of loss, maintain assumpsit in his own name, not on the policy, but on the new and express promise of the insurer to pay him for the loss.⁵

Policies of insurance are to be construed as other mercantile contracts, but the conditions and provisions of such policies are to be construed strictly against the underwriters.⁶

The following is merely suggested as a shorter form of declaring on a policy of insurance :

No. 77. On a fire insurance policy.

(Commence as in the last precedent.) For that whereas the defendant, on, etc., in, etc., made its policy of insurance, and delivered the same to the plaintiff; and for the consideration therein expressed promised the plaintiff in the terms of the said policy and the conditions thereto annexed, which said policy and conditions here follow in these words and figures, to wit : (here insert the policy and conditions verbatim.) And the plaintiff avers (proceed as in the last precedent, from the one asterisk to the other): Nevertheless, although the plaintiff has kept and performed all things in the said policy mentioned on his part to be kept and performed, the defendant has not yet paid to the plaintiff the said amount of the loss and damage aforesaid, or any part thereof, but refuses so to do.

¹ *Ins. Co. v. Wetmore*, 32 Ill. 221.

² *Ins. Co. v. Wetmore*, 32 Ill. 221.

³ *Ins. Co. v. Walsh*, 54 Ill. 164;
Ins. Co. v. Hervey, 34 Ill. 46.

⁴ *Ins. Co. v. Wetmore*, 32 Ill. 221;
Ins. Co. v. Hervey, 34 Ill. 46, and
cases cited; *Wilson v. Hakes*, 36

Ill. App. 545; *Glover v. Wells*, 40
Ill. App. 353.

⁵ *Ins. Co. v. Hervey*, 34 Ill. 46.

⁶ *Ins. Co. v. Eddy*, 49 Ill. 106; *Ins. Co. v. Brockway*, 39 Ill. App. 43; *Ass'n v. Frohard*, 33 Ill. App. 183; *Healey v. Ass'n*, 133 Ill. 561; *Ins. Co. v. Gordon*, 121 Ill. 372.

This mode of declaring—alleging that the defendant promised in the terms of a certain writing, and setting it out *in hæc verba*—is sufficient,¹ and has some advantages where the contract is of the vexatious length and complexity usual in policies of insurance.

The principal Illinois authorities on the subject of *fire*,²

¹ Man. & Gr. 709; 16 A. & E. N. S. 90; 1 Freeman's Pl. 476; *Ins. Co. v. Rogers*, 119 Ill. 474.

² *Ins. Co. v. O'Neil*, 13 Ill. 89; *Norton v. Ins. Co.*, 16 Ill. 236; *Ins. Co. v. Wright*, 23 Ill. 462; *Id. v. McCormick*, 24 Ill. 455; *Ins. Co. v. Staaßen*, 29 Ill. 38; *Id. v. Frost*, 37 Ill. 333; *Id. v. Wolf*, 37 Ill. 354; *Id. v. Schitter*, 38 Ill. 166; *Pomeroy v. Ins. Co.*, 40 Ill. 398; *Schmidt v. Ins. Co.*, 41 Ill. 295; *Ins. Co. v. Stivers*, 47 Ill. 86; *Id. v. Botts*, 47 Ill. 516; *Ducat v. City*, 48 Ill. 172; *Ins. Co. v. Mark*, 45 Ill. 482; *Id. v. Favorite*, 49 Ill. 259; *Id. v. Chestnut*, 50 Ill. 111; *Id. v. McDowell*, 50 Ill. 120; *Id. v. Malloy*, 50 Ill. 419; *Id. v. Anapow*, 51 Ill. 283; *Id. v. Maguire*, 51 Ill. 342; *Honore v. Ins. Co.*, 51 Ill. 409; *Ins. Co. v. Spankneble*, 52 Ill. 53; *Id. v. Booner*, 52 Ill. 442; *Id. v. Huckberger*, 52 Ill. 464; *Keith v. Ins. Co.*, 52 Ill. 518; *Ins. Co. v. Fix*, 53 Ill. 151; *Id. v. Holzgraf*, 53 Ill. 516; *Id. v. McGlesher*, 54 Ill. 513; *Id. v. Eddy*, 55 Ill. 213; *Id. v. Ives*, 56 Ill. 402; *Id. v. Cooper*, 60 Ill. 509; *Id. v. Hauselein*, 60 Ill. 521; *Id. v. Webster*, 69 Ill. 392; *Id. v. Fish*, 71 Ill. 620; *Id. v. Farrish*, 73 Ill. 166; *Id. v. Barrington*, 73 Ill. 230; *Id. v. Dunsmore*, 75 Ill. 14; *Edward v. Ins. Co.*, 74 Ill. 84; *Ins. Co. v. Cory*, 83 Ill. 453; *Ins. Co. v. Nelson*, 75 Ill. 548; *Id. v. Padfield*, 78 Ill. 167; *Id. v. Shipman*, 77 Ill. 189; *Id. v. Johnson*, 77 Ill. 598; *Id. v. Rubin*, 79 Ill. 402; *Id. v. Gould*, 80 Ill. 338; *Id. v. Cong.*, 80 Ill. 553; *Id.*

v. Gunning, 81 Ill. 236; *Id. v. Rothschild*, 82 Ill. 166; *Id. v. Jackson*, 83 Ill. 302; *Id. v. McGinnis*, 87 Ill. 70; *Id. v. Wells*, 89 Ill. 82; *Id. v. Ward*, 90 Ill. 545; *Id. v. Foster*, 90 Ill. 121; *Id. v. Hulman*, 92 Ill. 145; *Id. v. Foster*, 92 Ill. 334; *Id. v. Tucker*, 92 Ill. 64; *Johnson v. Ins. Co.*, 91 Ill. 92; *Ins. Co. v. McKee*, 94 Ill. 494; *Ins. Co. v. Olcott*, 97 Ill. 439; *Id. v. Chipp*, 93 Ill. 96; *Id. v. Scammon*, 100 Ill. 644; *Scammon v. Ins. Co.*, 101 Ill. 621; *C. A. Co. v. Scammon*, 102 Ill. 46; *Ins. Co. v. Garland*, 108 Ill. 220; *Thomas v. Ins. Co.*, 108 Ill. 91; *Schroeder v. Ins. Co.*, 109 Ill. 157; *Ins. Co. v. Steiger*, 109 Ill. 254; *Id. v. Weary*, 4 Bradw. 74; *Id. v. Mann*, 4 Bradw. 485; *Id. v. Clancey*, 9 Bradw. 137; *Id. v. Wrenn*, 11 Bradw. 242; *W. A. Co. v. Mason*, 5 Bradw. 141; *Ins. Co. v. Grunert*, 112 Ill. 72; *G. M. Co. v. Ass'n Co.*, 118 Ill. 398; *Ins. Co. v. Barrell*, 114 Ill. 102; *Id. v. Brown*, 123 Ill. 356; *Id. v. Steiger*, 124 Ill. 84; *Schimp v. Ins. Co.*, 124 Ill. 355; *Ins. Co. v. La Pointe*, 118 Ill. 387; *Id. v. Gordon*, 121 Ill. 372; *Id. v. Hick*, 125 Ill. 362; *Id. v. Cotton*, 125 Ill. 135; *Id. v. Pulver*, 126 Ill. 332; *C. A. Co. v. Scammon*, 126 Ill. 360; *Ins. Co. v. Ruskman*, 127 Ill. 372; *Id. v. Klewer*, 129 Ill. 607; *Id. v. Gueck*, 130 Ill. 351; *Id. v. Peck*, 133 Ill. 233; *Id. v. Kinneard*, 136 Ill. 201; *Id. v. Storig*, 137 Ill. 651; *Carlock v. Ins. Co.*, 138 Ill. 210; *Ins. Co. v. Brookway*, 138 Ill. 644; *Id. v. Race*, 142 Ill. 338; *Id. v. Bethel*,

life,¹ and *accident*² insurance are given below. See also observations under Form No. 154, *post*.

MISCELLANEOUS DECLARATIONS IN ASSUMPSIT.

No. 78. *On promise to be accountable for goods sold to a third person.*

(Commence as in No. 24, ante, to the (*) then proceed:) For that, whereas, heretofore, to wit, on, etc., at, etc., in consideration that the plaintiff, at the special instance and request of the defendant, would sell and deliver to one O. P. on credit, all such goods as the said O. P. should have occasion for and require of the plaintiff in the way of the plaintiff's trade and business of a (merchant), he, the defendant, undertook, and then and there promised the plaintiff to be accountable to the plaintiff for whatever goods the plaintiff should sell and deliver to the said O. P. as aforesaid; and the plaintiff avers that he, confiding in the said promise of the defendant, did, afterward, to wit, on, etc., at, etc., aforesaid, sell and deliver to the said O. P., on cer-

142 Ill. 537; *Id. v. Scammon*, 144 Ill. 490; *Id. v. Stock*, 149 Ill. 319; *Id. v. Hodges*, 149 Ill. 298; *Id. v. Pacaud*, 150 Ill. 245; *Heuer v. Ins. Co.*, 151 Ill. 331; *Platt v. Ins. Co.*, 153 Ill. 113.

¹ *Ins. Co. v. Fennell*, 49 Ill. 180; *Foley v. McMahan*, 73 Ill. 66; *Ins. Co. v. Schlitz*, 73 Ill. 586; *Ins. Co. v. Hogan*, 80 Ill. 35; *Society v. Winthrop*, 85 Ill. 537; *Ins. Co. v. Gray*, 91 Ill. 159; *Id. v. Pierce*, 75 Ill. 426; *Id. v. Anderson*, 77 Ill. 384; *Id. v. Mueller*, 77 Ill. 22; *People v. Phelps*, 78 Ill. 147; *Ins. Co. v. Foote*, 79 Ill. 361; *Id. v. Warner*, 80 Ill. 410; *Society v. Baldwin*, 86 Ill. 479; *Ins. Co. v. Palmer*, 81 Ill. 88; *Id. v. Baker*, 85 Ill. 410; *Id. v. Robinson*, 98 Ill. 324; *Lawrence v. Ins. Co.*, 5 Bradw. 280; *Ins. Co. v. Lawrence*, 8 Bradw. 488; *St. C. Co. v. Fielson*, 97 Ill. 474; *Ins. Co. v. Weck*, 9 Bradw. 358; *Id. v. Paul*, 10 Bradw. 431; *Glanz v. Gloeckler*, 104 Ill. 573; *Johnson v. Van Epps*, 110 Ill. 551; *Ass'n v. Hoffman*, 110 Ill. 603; *Miller v. Ins. Co.*, 110 Ill. 102; *Martin v. Stubbings*, 126 Ill. 399; *Ass'n v. Blue*, 120 Ill. 123; *Ins. Co. v. Rogers*, 119 Ill. 478; *Ins. Co. v. American*,

119 Ill. 331; *Pinneo v. Goodspeed*, 120 Ill. 529; *Cov. Ass'n v. Sears*, 114 Ill. 110; *Ass'n v. Hall*, 118 Ill. 171; *Hayes v. Ins. Co.*, 125 Ill. 626; *K. of H. v. Dalberg*, 138 Ill. 508; *Alexander v. Parker*, 144 Ill. 355; *A. O. U. W. v. Belcham*, 145 Ill. 308; *Hansen v. K. of H.*, 140 Ill. 301; *Ass'n v. Robinson*, 147 Ill. 138; *Id. v. Lommis*, 142 Ill. 560; *Id. v. Mueller*, 151 Ill. 254.

² *Acc. Ass'n v. Tuggles*, 138 Ill. 428; *Id. v. Taylor*, 42 Ill. App. 97; *Id. v. Wanner*, 24 Ill. App. 357; *Id. v. Frohard*, 134 Ill. 228; *Ben. Ass'n v. Sears*, 114 Ill. 108; *Lodge v. Cohn*, 20 Bradw. 335; *Suppiger v. Ben. Ass'n*, 20 Bradw. 599; *Ben. Ass'n v. Sears*, 114 Ill. 536; *Acc. Ass'n v. Miller*, 26 Ill. App. 230; *Id. v. Reil*, 38 Ill. App. 425; *Healey v. Acc. Ass'n*, 133 Ill. 560; *Ins. Co. v. Etten*, 40 Ill. App. 233; *Acc. Ass'n v. Mil-liard*, 43 Ill. App. 148; *Id. v. Kelsey*, 46 Ill. App. 371; *Getman v. Ins. Co.*, 46 Ill. App. 489; *Shaffer v. Ins. Co.*, 31 Ill. App. 113; *Acc. Ass. v. Stone*, 50 Ill. App. 222; *Id. v. Sanford*, 50 Ill. App. 424; *Mueller v. Acc. Ass'n*, 51 Ill. App. 40.

tain credit, then and there agreed upon between the plaintiff and the said O. P., to wit, — months, certain goods of great value, which he, the said O. P., then and there had occasion for and required in the way of the plaintiff's said trade and business, and at and for certain reasonable prices then and there agreed upon by and between the plaintiff and the said O. P., amounting in the whole to a large sum of money, to wit, the sum of — dollars; and although the said credit, and the time of payment of the price of the said goods, by the said O. P. to the plaintiff, as aforesaid, hath long since elapsed, yet the said O. P. has not, although requested by the plaintiff so to do, as yet paid the said sum of — dollars, or any part thereof, to the plaintiff, but has hitherto neglected and refused, and still neglects and refuses so to do; of all which said premises the defendant afterward, to wit, on, etc., had notice; yet the defendant, not regarding his promise and undertaking, has not as yet accounted to the plaintiff, or paid him the said sum of money for the said goods, or any part thereof, although requested so to do; and has neglected and refused so to do; and the said sum of — dollars still remains wholly due and unpaid to the plaintiff: to the damage of the plaintiff of — dollars; and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

(Add copy of account sued on.)

No. 79. Declaration on promise to pay money as difference in exchange of property.

(Commence as in No. 24, ante, to the () and then proceed:)* For that whereas, heretofore, to wit, on, etc., at, etc., in consideration that the plaintiff, at the special instance and request of the defendant, would deliver to the defendant, a certain (*horse*) of the plaintiff, of great value, to wit, etc., in exchange for a certain (*horse*) of him, the defendant, the defendant undertook, and then and there promised the plaintiff to deliver the said (*horse*) of the defendant, to the plaintiff, and to pay the plaintiff a certain sum, to wit, the sum of — dollars, in exchange for the said (*horse*) of the plaintiff; and the plaintiff avers that he did, afterward, to wit, on the same day aforesaid, at the place aforesaid, deliver to the defendant the said (*horse*) of the plaintiff; and although the defendant, in part performance of his said promise and undertaking, did then and there deliver to the plaintiff the said (*horse*) of the defendant, in exchange for the said (*horse*) of the plaintiff, yet the defendant, not further regarding his said promise and undertaking, has not, although often requested, as yet paid to the plaintiff the said sum of — dollars, or any part thereof, but neglects and refuses so to do, to the damage of the plaintiff of — dollars; and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

No. 80. Declaration on a written contract for employment—Plaintiff discharged without cause.

(Commence as in No. 24 ante, to the () and then proceed:)* For that whereas, heretofore, to wit, on, etc., at, etc., the plaintiff then and there being a bookkeeper by occupation, and the defendant a merchant, by a

certain agreement in writing, then and there entered into between the plaintiff and defendant, the defendant agreed to, and did employ the plaintiff to keep the books and accounts of the defendant connected with his said business as a merchant, for the period of — years from the date of said contract; and the plaintiff then and there accepted the said employment, and in consideration thereof, the defendant then and there undertook and promised the plaintiff to pay him for such services the sum of — dollars per annum, payable monthly; and the plaintiff further avers, that he then and there entered into the employment of the defendant as such book-keeper, and continued therein until on, etc., when the defendant, without any reasonable or just cause, discharged the plaintiff from such service and employment, and refused to allow the plaintiff to continue therein; and the plaintiff further avers that he has always been ready and willing and has offered the defendant to continue in the service of the defendant as aforesaid, and to perform all the duties required of him to be performed, according to the terms of said contract; and the plaintiff further avers that there is now due him from the defendant a large sum of money, to wit, the sum of — dollars, being the amount due the plaintiff under said contract, from the date of his wrongful discharge as aforesaid, until, etc.

And the plaintiff further avers that afterward, to wit, on, etc., he requested the defendant to pay him, the plaintiff, the said sum of money, but the defendant refused, and still refuses so to do; and the said sum of money remains wholly due and unpaid to the plaintiff; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

(Add copy of contract sued on.)

No. 81. Declaration on a verbal contract of employment—Plaintiff discharged without cause.

(Commence as in No. 24, ante, to the () and then proceed:)* For that whereas, heretofore, to wit, on, etc., at etc., the defendant then and there being a merchant, and the plaintiff a salesman, in consideration that the plaintiff would enter into the employment of the defendant as such salesman, the defendant then and there undertook and promised the plaintiff to employ him as such salesman, for the period of one year from said date; and to pay him, the plaintiff, for such services the sum of — dollars, to be paid in monthly installments of — dollars each, at the end of each and every month; and the plaintiff, in consideration of such employment and salary to be paid, on, etc., entered into the service of the defendant as such salesman, and continued therein until, on, etc., when the defendant, without any reasonable cause, wrongfully discharged the plaintiff from his said service, and refused to permit the plaintiff to complete his contract for service as aforesaid; and the plaintiff further avers, that at the time of his discharge, and from thence until the expiration of the period of his employment, he was ready, able and willing to perform the duties of such service for the defendant, and in every respect to comply with the terms of said contract with the defendant; and the plaintiff further avers that by reason

of the premises the defendant became liable to pay the plaintiff the full amount of the salary so promised to be paid for the full period of one year. and that there is now due from the defendant to the plaintiff, under said contract, a large sum of money, to wit, —— dollars, and although often requested, the defendant refuses to pay the same, or any part thereof, to the plaintiff; and the said sum of money remains due and unpaid to the plaintiff; to the damage of the plaintiff of —— dollars; and therefore he brings his suit, etc.

E. F., Attorney for Plaintiff.

(Add copy of account sued on. Common counts may also be added.)

CHAPTER V.

DEFENSES TO THE ACTION OF ASSUMPSIT.

THE GENERAL ISSUE.

The most usual plea by way of traverse, in the action of *assumpsit*, is what is called the general issue—*non assumpsit*—which imports a general denial of all the material allegations in the declaration.

The declaration in an action of *assumpsit* states that the defendant, upon a certain consideration set forth, made a certain promise to the plaintiff. The plea of *non-assumpsit*, or general issue, states that the defendant “did not promise in manner and form,” etc. It would seem at first glance that this only put in issue the promise as alleged in the declaration. A much wider effect, however, is given to this plea. The law will always *imply* a promise in consideration of an existing debt or liability; and this action may consequently, as we have seen, be founded upon an *implied* promise, as well as upon one expressed. When the promise relied on is an *implied* one, and the plea of *non-assumpsit* is interposed, the plaintiff must prove on the trial the liability from which the implied promise arises; and in such case it is proper that the defendant should, under his plea denying the promise, be permitted to show any circumstance by which the liability is disproved. This plea puts in issue the contract or promise, as stated in the plaintiff’s declaration, and enables the defendant to show that he never in fact contracted at all; and also, that he did not contract in the manner stated in the declaration, and thus to take advantage of any material variance.

A special plea which simply traverses a portion of the facts which the plaintiff is bound to prove in order to establish *prima facie* a right to recover under his declaration, is bad as

amounting to the general issue;¹ and when the general issue and special pleas are pleaded, and the matter of the special pleas can be given in evidence under the general issue, the special pleas are obnoxious to a special demurrer,² and may be stricken from the files,³ even after a general demurrer thereto has been overruled.⁴

The plea of the general issue compels the plaintiff to prove every essential averment in his declaration that goes to make up the liability of the defendant.⁵ Under this plea, however, the character in which the plaintiff sues is admitted.⁶ If the suit is brought by a corporation, the defendant, by pleading the general issue, admits the plaintiff's right and capacity to sue; if he wishes to deny the existence of the corporation, he should put in a plea for that purpose.⁷ It can not be put in issue by the general issue and notice denying that the plaintiff is a corporation.⁸

Evidence tending to prove payment may be given in evidence under the general issue,⁹ but evidence of set-off can not be.¹⁰ If the fact of usury appears by the declaration, it need not be specially pleaded;¹¹ and the same is true in some cases of the defense of the statute of limitations.¹² The non-joinder of a party as plaintiff may also be shown under the general issue.¹³

When the defendant desires to put in issue the execution of a note, or other instrument specially declared on, it would

¹ *Kroebel v. Kircher*, 33 Ill. 308; *R. R. Co. v. Johnson*, 34 Ill. 389; *Johnson v. University*, 35 Ill. 518.

² *Manny v. Rixford*, 44 Ill. 129; *Ogden v. Lucas*, 48 Ill. 492; *Wadhams v. Swan*, 109 Ill. 47; *Edwards v. Trustees*, 30 Ill. App. 531.

³ *Manny v. Rixford*, 44 Ill. 129; *Governor v. Lagow*, 43 Ill. 134.

⁴ *R. R. Co. v. Johnson*, 34 Ill. 389.

⁵ *Dudley v. Sumner*, 5 Mass. 438; *R. R. Co. v. Brown*, 23 Ill. 94; *Gay v. Keys*, 30 Ill. 413; *Conant v. Grif-fin*, 48 Ill. 410; see *Governor v. Lagow*, 43 Ill. 134.

⁶ *McKinley v. Braden*, 1 Scam. 64;

Linville v. Earlywine, 4 Blackf. 469; *Freeman v. Mill Co.*, 38 Maine 343; *McNulta v. Lockridge*, 137 Ill. 270;

⁷ *McIntire v. Preston*, 5 Gilm. 48; *McNulta v. Lockridge*, 137 Ill. 270; *Freeman v. Mill Co.*, 38 Maine 343.

⁸ *Bailey v. Bank*, 127 Ill. 332.

⁹ *Crews v. Bleakley*, 16 Ill. 21; *Gray v. Tunstall*, 1 Hemp. 558; 1 Chit. Pl. 418-20.

¹⁰ *Kennard v. Secor*, 57 Ill. App. 415.

¹¹ *Drake v. Latham*, 50 Ill. 270.

¹² *Thompson v. Reed*, 48 Ill. 118.

¹³ *Henrichsen v. Mudd*, 33 Ill. 476; *Dement v. Rokker*, 126 Ill. 191.

seem that the plea of *non-assumpsit*, verified by affidavit, is the proper plea under the statute of Illinois.¹ It is not competent under the general issue to show a total or partial failure of the consideration of a promissory note.² In a suit by an agent against his principal, for services performed, the defendant may under the general issue show gross misconduct, fraud, negligence and unskillfulness on the part of the plaintiff in the performance of his duties, and thus defeat his right to compensation.³

Under the general issue in *assumpsit*, the defendant's coverture at the time of making the contract may be given in evidence.⁴ Damages for delay in completing work under a contract may be recouped under the general issue.⁵ Recoupment is permissible under the general issue, in a suit for the price of an article sold, where there was a warranty of the article and the evidence shows a breach of the warranty.⁶

No. 82. *Plea of non-assumpsit.*

In the ——— Court.

— Term, 18—.

C. D. }
ats. } *Assumpsit.*

A. B. } And the defendant, by E. F., his attorney, comes and defends the wrong and injury when, etc., and says that he did not promise in manner and form as the plaintiff has above thereof complained against him; and of this he puts himself upon the country, etc.

¹ *Hinton v. Husbands*, 3 Scam. 187; *Warren v. Chambers*, 12 Ill. 124; *Shufeldt v. Seymour*, 21 Ill. 524; see *Stevenson v. Farnsworth*, 2 Gilm. 715; *Hunt v. Weir*, 29 Ill. 83; *Murchie v. Peck*, 57 Ill. App. 396; *Williams v. Pow. Co.*, 36 Ill. App. 107; *Ry. Co. v. Carson*, 51 Ill. App. 552; *Renting Co. v. Hutchinson*, 25 Ill. App. 476.

² *Rose v. Mortimer*, 17 Ill. 475; *Keith v. Mafit*, 38 Ill. 303; *Swain v. Cawood*, 2 Scam. 505; *Leggat v. Sands*, 60 Ill. 158; *Schroier v. Wesel*, 89 Ill. 113.

³ *Denew v. Deverell*, 3 Camp. 451; *Dodge v. Trilsen*, 12 Pick. 328; *Pres-*

cott v. White, 18 Ill. App. 322; *Harvey v. Cook*, 24 Ill. App. 134.

⁴ *Streeter v. Streeter*, 43 Ill. 155; 1 Chit. Pl. 388, 417.

⁵ *Cook v. Preble*, 80 Ill. 381; *Mayer v. Mitchell*, 59 Ill. App. 26.

⁶ *Higgins v. Lee*, 16 Ill. 495; *Babcock v. Trice*, 18 Ill. 420; *Mears v. Nicols*, 41 Ill. 207; *Hutt v. Burckman*, 55 Ill. 441; *Murry v. Carlin*, 67 Ill. 286; *Cook v. Preble*, 80 Ill. 381; *Wadhams v. Swan*, 109 Ill. 46; *Tully v. Iron Works*, 115 Ill. 544; *McCormick v. Robinson*, 60 Ill. App. 253; *Underwood v. Wolf*, 131 Ill. 425.

AFFIDAVIT OF MERITS.

In Illinois, were the plaintiff files with his declaration an affidavit of his claim, the defendant must file with his plea an affidavit of merits;¹ and for want of such affidavit the plea will be stricken from the files.² If the affidavit is defective, the court, in its discretion, may grant leave to amend, upon terms, such as showing a meritorious defense.³ The statute has not made it obligatory on the defendant to set out in detail his defense in an affidavit of merits filed with his pleas.⁴

An affidavit which states that the defendant has a good and valid defense to the whole of the plaintiff's demand upon the merits, as he verily believes, is a sufficient compliance with the requirements of the statute. If it meets all the substantial requirements of the statute it will be sufficient, although not in its precise words.⁵

The evident purpose of the statute is to facilitate the collection of debts, by cutting off pleas which are without foundation in fact, and are interposed merely for delay. If the defendant attempts to state the facts of his defense, and they are insufficient, the affidavit will be bad, and may be stricken from the files.⁶

No. 83. Affidavit of merits, to be filed with plea.

(Title of court and cause.)

C. D. makes oath and says that he is the defendant in the above entitled cause, and that he verily believes that he has a good defense to this suit, upon the merits, to (*) the whole of the plaintiff's demand. C. D.

(Add jurat.)

¹ Rev. Stat. (1893), 1076; Rev. Stat. (1895), 1160; 2 Starr & Curtis 1801; *Kassings v. Griffith*, 86 Ill. 265; *Honore v. Bank*, 80 Ill. 489.

² *Filkins v. Byrne*, 72 Ill. 101; *Bank v. Hull*, 74 Ill. 106; *Goldie v. McDonald*, 78 Ill. 605; *Coursen v. Browning*, 86 Ill. 57; *Braidwood v. Weiller*, 89 Ill. 606; *Bailey v. Bank*, 127 Ill. 332; *Truesdell v. Hunter*, 28 Ill. App. 292.

³ *McKichan v. Follett*, 87 Ill. 103; *Hays v. Loomis*, 84 Ill. 18; *McCord*

v. Crooker, 83 Ill. 556; *Culver v. Johnson*, 90 Ill. 91.

⁴ *Beardsley v. Gosling*, 86 Ill. 58; *Hayes v. Loomis*, 84 Ill. 18; *Wadsworth v. Bank*, 84 Ill. 272; *McCormick v. Wells*, 83 Ill. 239.

⁵ *Harrison v. Willett*, 79 Ill. 482; *Stuber v. Schack*, 83 Ill. 191; *McCormick v. Wells*, 83 Ill. 239; *Hayes v. Loomis*, 84 Ill. 18; *Wadsworth v. Bank*, 84 Ill. 272.

⁶ *Stuber v. Shack*, 83 Ill. 191; *McCord v. Crooker*, 83 Ill. 556.

The affidavit may be sworn to by one of several defendants pleading jointly.¹ If the defense is to a part only of the demand, the affidavit may be as in the above form to the asterisk, and will then proceed thus:

“a part of the plaintiff's demand, which said part amounts to — dollars, according to the best of his judgment and belief.”

An affidavit stating that the defendant has a good defense as to all of the plaintiff's demand, except a certain sum named, is a virtual admission that the sum thus excepted is due to the plaintiff.² And he may take judgment therefor, regardless of pleas to the whole cause of action.³

GENERAL ISSUE, WITH NOTICE OF SPECIAL MATTERS.

The statute of Illinois provides that “the defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense, or may plead the general issue, and give notice in writing under the same of the special matters intended to be relied on for a defense on the trial; under which notice, if adjudged by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded, and issue taken thereon;” and that “the defendant in any action brought upon any contract or agreement, either expressed or implied, having claims or demands against the plaintiff in such action, may plead the same, or give notice thereof under the general issue, or under the plea of payment.”⁴

Such notice relieves the defendant of the necessity of pleading specially any facts not provable under the general issue, and to introduce evidence in their support, if material and explicitly stated, as if the same had been specially pleaded. The court, on the trial, must determine the materiality of the facts stated. But in no sense does the notice take the place of the general issue, or the plea of *non est factum*, or the like plea.⁵

¹ *Smith v. Bateman*, 79 Ill. 531.

² *Williams v. Reynolds*, 86 Ill. 263.

³ *Henry v. M. Co.*, 83 Ill. 461; *Mayberry v. Van Horn*, 83 Ill. 239; *Allen*

v. Watt, 69 Ill. 655; *Haggard v. Smith*, 71 Ill. 226.

⁴ Rev. Stat. (1893), 1075; Rev. Stat. (1895), 1159; 2 Starr & Curtis 1789.

⁵ *Bailey v. Bank*, 127 Ill. 332.

No. 84. Notice of set-off, under general issue.

In the ——— Court.

C. D. }
 ats. } *Assumpsit.*
 A. B. }

The plaintiff will take notice that on the trial of this cause the defendant will give in evidence, and insist, that the plaintiff was before and at the time of the commencement of this suit, and still is, indebted to the defendant in the sum of ——— dollars, for (*here state the matter or matters of set-off, precisely as in a plea; demands such as would be recoverable under common counts may be set forth as in such counts, or as in the consolidated common counts;*) and that on such trial the defendant will set off and allow to the plaintiff, against any demand on his part to be proved on such trial, so much of the said sum (*or "sums"*) of money so due from him to the defendant as will be sufficient to satisfy and discharge such demand.

Dated this ——— day of ———, 18—.

E. F., Attorney for Defendant.

The commencement of this form may be used in notices of any other matters of defense. In practice, the notice is written by the pleader at the foot of the plea or pleas, and is not served on the plaintiff. It is said that the notice of set-off should, in point of form, be as certain as a declaration.¹ By the statute of Illinois, the defendant is required to file with his plea or notice of set-off a copy of the instrument or account upon which he intends to rely. After such plea or notice has been interposed, the plaintiff can not dismiss his suit without the consent of the defendant, or leave of the court.²

It is only when evidence is offered under a notice, that the sufficiency of the notice can be tested; and if the matters stated therein do not constitute a defense to the action, the evidence offered will be excluded. No issue of law or fact can be formed on the notice.³ It is strongly intimated, however, in one of the cases noted (29 Ill. 83), that the sufficiency of the notice is a preliminary question, which ought to be raised by demurrer.

¹ Bul. Ni. Pri. 179.

² Rev. Stat. (1893), 1075; Rev. Stat. (1895), 1159; Starr & Curtis 1797; Sav. Inst. v. Brocksmith, 72 Ill. 370.

³ Burgwin v. Babcock, 11 Ill. 28; Sherman v. Dutch, 16 Ill. 283; Hunt

v. Weir, 29 Ill. 83; Miller v. Miller, 16 Ill. 296; Whitehall v. Smith, 24 Ill. 166; Bailey v. Bank, 127 Ill. 332; Tottleben v. Blankenship, 58 Ill. App. 47.

Where a notice filed with the general issue is inconsistent, or indefinite and uncertain, it may be stricken from the files.¹ A special notice should apprise the plaintiff with reasonable certainty of the matter of defense, so that he may not be taken by surprise on the trial.²

The general issue, with notice of special matter, and special pleas, can not be pleaded at the same time; and if this is attempted to be done, the pleas may be stricken from the files.³ A partial failure of consideration can not be given in evidence under the general issue and a notice of set-off and of total failure of consideration.⁴

When the general issue is pleaded, with a notice of special matter to be proved on the trial, if such special matter goes to the denial of the execution of a note sued on, the evidence offered to establish this fact will be inadmissible. Such a defense must be by plea, verified by oath.

PLEA OF STATUTE OF LIMITATIONS.

At present the statute of Illinois (act of 1872) requires all suits on unwritten contracts, expressed or implied, to be brought within five years, and all suits on written contracts or other evidences of debt within ten years, after the accruing of the respective causes of action. If any payment or new promise is made, in writing, on any such written contract or evidence of debt, within or after such period of ten years, an action may be commenced thereon at any time within ten years after such payment or promise. If the person entitled to bring a personal action is an infant or insane, or imprisoned on a criminal charge, at the time of the accruing of the cause of action, the suit may be brought within two years after the disability is removed. And if a person liable to an action fraudulently conceals the cause of such action from the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action.⁵

¹ *Henrichsen v. Mudd*, 33 Ill. 476.

² *Rosenburg v. Angell*, 6 Mich. 508.

³ *Gilmore v. Nowland*, 26 Ill. 200.

⁴ *Swain v. Cawood*, 2 Scam. 505.

⁵ Rev. Stat. (1893), 941; Rev. Stat. (1895), 1003; Starr & Curtis 1552-3; *Knight v. Ry. Co.*, 141 Ill. 110.

Actions for a statutory penalty must be commenced within two years next after the cause of action accrued.¹ Five years is the period of limitation in Illinois, to an action on a judgment obtained in another state.² The limitation law in force when the cause of action accrues is the law which governs as to the time within which the action must be brought.³ The statute of limitations must be specially pleaded to all actions of a personal nature.⁴ The statute may be interposed by demurrer when the declaration or petition discloses the proper facts to raise the question.⁵

Under the former law of Illinois, in respect to personal actions, if a person against whom there was a cause of action was out of the state, either at the time of the accruing of such cause or afterward (within the time limited), so that process could not be served on him, the statute ceased to run for the time of his absence, whether he had removed absolutely or was merely absent temporarily.⁶

The present statute (in force on and since July 1, 1873) provides, that "if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited after his coming into or return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is no part of the time limited for the commencement of the action."⁷

Municipal corporations are not within the operation of the statute of limitations, as respects public rights, although the

¹ *Gridley v. Barnes*, 103 Ill. 211.

² *Ambler v. Whipple*, 139 Ill. 511; *Robb v. Anderson*, 43 Ill. App. 575.

³ *Beesley v. Spencer*, 25 Ill. 216; *Garrison v. People*, 87 Ill. 96; *Dickinson v. R. R. Co.*, 77 Ill. 331; *Hyman v. Bayne*, 83 Ill. 256; *University v. Weer*, 21 Ill. App. 29; *Tilton v. Yount*, 28 Ill. App. 580; *McMullen v. McCormick*, 117 Ill. 83; *Wooley v. Yarnell*, 142 Ill. 442; *Drury v. Henderson*, 143 Ill. 315.

⁴ 1 Chit. Pl. 420; *Burnap v. Wright*, 14 Ill. 303; *Gebhart v. Adams*, 23

Ill. 397; *R. R. Co. v. Glenney*, 28 Ill. App. 364.

⁵ *County v. Com.*, 52 Ill. 454; *Ilett v. Collins*, 103 Ill. 74; *Bank v. Jenkins*, 104 Ill. 143; *Bell v. Johnson*, 111 Ill. 374; *People v. Boyd*, 132 Ill. 60.

⁶ *Vanlandingham v. Huston*, 4 Gilm. 125; *Chenot v. Lefevre*, 3 Gilm. 637.

⁷ 2 Starr & Curtis 1556; Rev. Stat. (1893), 941; Rev. Stat. (1895), 1003; see *Pells v. Snell*, 130 Ill. 379; *Wooley v. Yarnell*, 142 Ill. 442.

rule is different as to contracts, or mere private rights.¹ Where a statute of limitations begins to run, it will continue to run until it operates as a complete bar, unless there is some saving clause or qualification in the statute itself.²

Cases within the reason, but not within the words of the statute, are not barred by it,³ and it will not be applied to cases not clearly within its provisions.⁴ Where separate causes of action are set up in separate counts and the defendant pleads the statute to the whole declaration, the plaintiff is entitled to recover if one of the causes of action is not within the bar.⁵

The death of the debtor will not stop the running of the statute.⁶ Where all the items of an open unliquidated account are on one side, the last item which happens to be within six years, will not draw after it those that are of longer standing, so as to protect them from the operation of the statute of limitations.⁷

When the statute begins to run.—The statute of limitations begins to run when the cause of action accrues.⁸ Where an action barred by limitation is revived by a new promise to pay, an immediate right of action will arise therefrom, and the statute of limitations in force at that date will apply and fix the time within which such right of action may be enforced by the courts.⁹ If a suit is brought to recover for services, and amounts have been paid from time to time on the services,

¹ *Catlett v. People*, 151 Ill. 16; *People v. Oran*, 121 Ill. 650.

² *People v. White*, 11 Ill. 342; *Peoria Co. v. Gordon*, 82 Ill. 435.

³ *Bedell v. Janney*, 4 Gilm. 194; *Dawdy v. Nelson*, 12 Bradw. 74; *McClintic v. Layman*, 12 Bradw. 356.

⁴ *Hazell v. Shelby*, 11 Ill. 9.

⁵ 1 Chit. Pl. 546; *Perkins v. Burbank*, 2 Mass. 81; *Penna Co. v. Sloan*, 125 Ill. 72.

⁶ *Baker v. Brown*, 18 Ill. 91; *People v. White*, 11 Ill. 350; *Shelburn v. Robinson*, 3 Gilm. 598; *Bonney v. Stoughton*, 122 Ill. 536; see *Pinkney v. Pinkney*, 61 Ill. App. 525.

⁷ *Kimball v. Brown*, 7 Wend. 322;

Thompson v. Reed, 48 Ill. 119; *Reeves v. Herr*, 59 Ill. App. 81.

⁸ *Shelburne v. Robinson*, 3 Gilm. 597; *Thompson v. Reed*, 48 Ill. 118; *Collins v. Thayer*, 74 Ill. 138; *Cochran v. Oliver*, 7 Bradw. 176; *Dawdy v. Nelson*, 12 Brad. 74; *Dugan v. Follett*, 100 Ill. 581; *Selleck v. Selleck* 107 Ill. 389; *McConnell v. Kebbe*, 33 Ill. 175; *M. D. Co. v. Topping*, 89 Ill. 65; *Schillo v. McEuen*, 90 Ill. 77; *Emmons v. Moore*, 85 Ill. 304; *Dickerson v. Merriman*, 100 Ill. 342; *Ry. Co. v. Jenkins*, 103 Ill. 588; *Rentchler v. Kunkelman*, 17 Bradw. 343; *Suppiger v. Gruaz*, 137 Ill. 216.

⁹ *Drury v. Henderson*, 143 Ill. 315.

the statute does not begin to run until the date of the last payment.¹

When one continuous piece of work, consisting of a number of parts or items, is to be performed, the statute of limitations does not begin to run upon the completion of each separate part or item but upon the completion of the whole. If the several items are merely parts of one transaction, the statute begins to run from the date of the last item.² The statute begins to run against an assessment by a corporation upon its stockholders at the date of the assessment.³ In a case where some act is to be done, or condition precedent to be performed, by a party, to entitle him to his right to sue, and no definite time is fixed at which the act is to be done or condition performed, he must exercise a reasonable diligence to do the one or perform the other, or he will be barred by the statute of limitations.⁴ To support a plea of the statute of limitations to a new count, where such plea will not lie to the original declaration, it must appear that the new count introduces into the case a cause of action which is substantially and essentially new. If a new count merely tells the same story in a different way, or is a mere amplification or more specific statement of the cause of action already declared upon, the plea can not be sustained.⁵ Where no new cause of action is introduced, courts will allow amendments liberally for the purpose of avoiding the running of the statute.⁶

New promise.—The promise to pay a debt barred by the statute only removes the bar, and leaves the case to be proved as if no statute had been pleaded.⁷ An acknowledgment that the original debt once existed is not sufficient to take the case

¹ *Miller v. Cinnamon*, 61 Ill. App. 429.

² *O'Brien v. Sexton*, 140 Ill. 517.

³ *Tel. Co. v. Barker*, 56 Ill. App. 402.

⁴ *Shelburne v. Robinson*, 3 Gilm. 597.

⁵ *R. R. Co. v. Traves*, 17 Bradw. 136; *Mill Co. v. Monka*, 107 Ill. 340; *Phelps v. R. R. Co.*, 94 Ill. 548; *I. C. Co. v. Cobb*, 64 Ill. 128; *R. R. Co. v.*

Phelps, 4 Bradw. 238; *Fish v. Farwell*, 54 Ill. App. 457; *R. R. Co. v. Jones*, 149 Ill. 361; *Blanchard v. Ry. Co.*, 126 Ill. 416; *Ry. Co. v. Henneberry*, 153 Ill. 354.

⁶ *McDowell v. Towns*, 90 Ill. 359; *Coal Co. v. Taylor*, 81 Ill. 590; *Ins. Co. v. Mueller*, 77 Ill. 22; *Challenor v. Niles*, 78 Ill. 78.

⁷ *Kinnell v. Schwartz*, Breese 278; *Teessen v. Camblin*, 1 Bradw. 424.

out of the statute, but there must be an unqualified admission that the debt is due and unpaid,¹ and an intention evinced to pay it.² To take the case out of the statute of limitations the new promise must be made to the party seeking its benefit, or to some one authorized to act for him. A promise to a stranger is insufficient.³ If a maker of a note makes a partial payment thereon, the law implies a new promise to pay the balance. But this new promise can only be implied where the maker designedly makes a payment on the note. If the holder indorses a credit without authority from the debtor, it will not impose upon him the obligation of a new promise.⁴

There must be an unqualified acknowledgment of the debt; a promise to pay on a contingency which has not happened is not sufficient.⁵ A promise by the defendant that he will settle with the plaintiff as soon as he gets the money for certain work, is a conditional promise, and can neither serve for the foundation of an action nor be taken as a waiver of the statute of limitations, without at least proving that the defendant received the money for the work.⁶

In order to revive a debt barred by the statute of limitations, where the cause of action has accrued after the act of April 4, 1872, took effect, the new promise must be in writing.⁷ The requirement that the payment or new promise

¹ *Wetzell v. Bussard*, 11 Wheat. 309; *Bell v. Morrison*, 1 Peters 360; *Ayers v. Richards*, 12 Ill. 146; *Bangs v. Hall*, 2 Pick. 368; *Waldron v. Alexander*, 136 Ill. 550.

² *Quayle v. Guild*, 91 Ill. 378; *Keener v. Crull*, 19 Ill. 189; *Norton v. Colby*, 52 Ill. 198; *Wooters v. King*, 54 Ill. 343; *Wachter v. Albee*, 80 Ill. 47; *Mandel v. Gundershimer*, 61 Ill. App. 333.

³ *Keener v. Crull*, 19 Ill. 189; *Teesen v. Camblin*, 1 Bradw. 424; *Wachter v. Albee*, 80 Ill. 47; *McGrew v. Forsythe*, 80 Ill. 596; *Carroll v. Forsythe*, 69 Ill. 127; *Bloomfield v. Bloomfield*, 7 Bradw. 261; *Katz v. Moessinger*, 7 Bradw. 536; *Patterson v. Collar*, 31 Ill. App. 348.

⁴ *Lowery v. Gear*, 32 Ill. 382; *Pease v. Catlin*, 1 Bradw. 88; *Ditch v. Vollhardt*, 82 Ill. 134; *Connelly v. Pierson*, 4 Gilm. 108; *Simmons v. Nelson*, 48 Ill. App. 520.

⁵ *Dickerson v. Sutton*, 40 Ill. 403; *Cagwin v. Ball*, 2 Bradw. 70; *Hayward v. Gunn*, 4 Bradw. 161; *Kallenbach v. Dickenson*, 100 Ill. 427; *Bassett v. Noble*, 15 Bradw. 360; *Horner v. Starkey*, 27 Ill. 15; *Sennott v. Horner*, 30 Ill. 429; *Patterson v. Collar*, 31 Ill. App. 348; *Murphy v. Holway*, 25 Ill. App. 554.

⁶ *Mullet v. Strumph*, 27 Ill. 107; *Murphy v. Holway*, 25 Ill. App. 554.

⁷ *Robinson v. Brisco*, 55 Ill. App. 131; *Ziegler v. Tennery*, 23 Ill. App. 133; *Baldwin v. Baldwin*, 26 Ill.

shall be "in writing" does not apply so far as to require the evidence of it to be so preserved, and the words "in writing" have reference alone to the specified new promise to pay.¹ An admission of the indebtedness will take the case out of the statute, although the amount of the indebtedness is not fixed.²

A verbal promise to pay a note previously given has the same effect, as regards the statute of limitation, as a re-delivery of the note, and the note is good for the same period that it would be if it were dated on the day of the new promise.³ One joint debtor can not, by a partial payment, made without knowledge, assent, or subsequent ratification by the other, bind the latter so as to authorize the inference of a new promise on his part, and avoid the effect of the statute of limitations.⁴ To take a case out of the statute by a partial payment it must appear that the payment was made on account of the debt for which the action is brought;⁵ and there must be proof that such payment was made by the defendant.⁶ The acknowledgment of a debt, in order to take it out of the statute, must clearly refer to the very debt in question between the parties.⁷

On foreclosure of mortgage.—Section 11 and section 16 of the limitation law are to be construed together. The effect of the former section, when so construed, is the same as the law implied before its passage, that is, that the period of limitation which bars the debt bars also the mortgage or deed of trust securing the same.⁸

No. 85. Plea of the statute of limitations.

(If pleaded as a first plea, commence as indicated in the observation under this form; if as a second or subsequent plea, commence as follows:) And for a further plea in this behalf, the defendant says that the plaintiff ought not

App. 177; *Honn v. Pinnell*, 61 Ill. App. 137; *Davis v. Mann*, 43 Ill. App. 301.

¹ *Bowles v. Keator*, 47 Ill. App. 98.

² *Schmidt v. Pfau*, 114 Ill. 495; see *Neustacher v. Schmidt*, 25 Ill. App. 626.

³ *Sennott v. Horner*, 30 Ill. 429.

⁴ *Boynton v. Spafford*, 61 Ill. App. 384; *Kallenbach v. Dickenson*, 100 Ill. 427.

⁵ *Lowery v. Gear*, 32 Ill. 382; *City v. Hunter*, 10 Bradw. 230.

⁶ *Lowery v. Gear*, 32 Ill. 382; *Kallenbach v. Dickinson*, 100 Ill. 427.

⁷ *Clarke v. Dutcher*, 9 Cowen, 674.

⁸ *Schifferstein v. Allison*, 123 Ill. 662; *Waughop v. Bartlett*, 61 Ill. App. 252; *Harris v. Mills*, 28 Ill. 44; *Gilbert v. Guptill*, 34 Ill. 112.

to have his aforesaid action against him, the defendant, because he says (*) that the several supposed causes of action in the said declaration mentioned did not, nor did any or either of them, accrue *to the plaintiff* at any time within five years next before the commencement of this suit, in manner and form as the plaintiff has above complained against him, the defendant: And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid judgment against him, etc.

A *first* plea, when *special*, commences (after the title of the court, etc.) in this manner:

“And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action,” etc.

The above form of the plea of the statute of limitations (*actio non accrevit, etc.*) is necessary whenever it is desired to plead that defense to a declaration containing a count on a cause of action which did not accrue until after the making of the contract—as on a promissory note, for example; and it will suffice in all cases, though in *indebitatus assumpsit*, and in other instances where the statute begins to run from the time of the promise, it is proper to plead that the defendant did not at any time within five years, etc., promise, etc. (*non assumpsit, infra, etc.*)¹ The italicized words, *to the plaintiff*, are to be omitted in actions at the suit of executors, etc.

No. 86. *Replication to No. 85—Causes of action did accrue within five years.*

(Similiter to *general issue*, if pleaded, as ante, No. 10; if not, entitle first replication as in that form.) And the plaintiff, as to the plea of the defendant by him *secondly* above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says (*) that the said several causes of action, and each and every of them, did accrue *to him* within five years next before the commencement of this suit, in manner and form as he has above complained against the defendant: And this the plaintiff prays may be inquired of by the country, etc.

Under this replication the plaintiff may not only show that the cause of action did accrue within five years, but may prove a promise or acknowledgment made after the accruing of the original cause of action, and within the time limited by the

¹ 3 Chit. Pl. 940, 941, notes; *Leaper v. Tatton*, 16 East 421.

statute;' though it is said a special replication is in general advisable, because it reduces the proof to be adduced by the plaintiff on the trial.²

No. 88. Replication to No. 85. Defendant was out of the state when causes of action accrued.

(As in No. 86, to the asterisk, and then proceed :) that the defendant, at the time when the said several causes of action accrued to the plaintiff, was out of this state, to wit, at —, in —; and that he, the defendant, afterward, to wit, on etc., returned to this state; which said return of the defendant was his first return to this state after the accruing of the several causes of action aforesaid: And the plaintiff further says, that he commenced his said action within five years next after the defendant's first return as aforesaid to this state after the accruing of the said several causes of action. And this the plaintiff is ready to verify; wherefore he prays judgments, and his damages, etc., to be adjudged, to him, etc.

The plaintiff may (in Illinois) also reply that after the cause of action accrued, the defendant departed from and resided out of the state, etc.³

No. 89. Rejoinder to No. 88, denying that action was commenced within five years after defendant's return, etc.

(Similiter as ante, No. 87, to any replication or replications there may be, concluding to the country. If none, entitle first rejoinder as in that form.) And the defendant, as to the said replication of the plaintiff to the said second plea of the defendant, says that the plaintiff ought not, by reason of anything in that replication alleged, to have his aforesaid action against him, the defendant, because he says (*) that the plaintiff did not commence his said action within five years next after the defendant's first return to this state after the accruing of the said several supposed causes of action, in manner and form as the plaintiff has above in that replication alleged: And of this the defendant puts himself upon the country, etc.

The principal Illinois cases, not already cited, relating to limitations of personal actions, are noted below.⁴

¹ 1 Chit. Pl. 502; 2 Swan's Pl. 699, c.

² 1 Chit. Pl. 503.

³ Rev. Stat. (1893), 941; Rev. Stat. (1895), 1003; 2 Starr & Curtis 1556.

⁴ *Naught v. O'Neal*, Breese 36; *Bank v. Brown*, 1 Scam. 106; *Tufts v. Rice*, Breese 64; *White v. Hight*, 1 Scam. 204; *Watkins v. White*, 3 Scam. 549;

Hedges v. Madison, 1 Gilm. 306; *Rhinehardt v. Schuyler*, 2 Gilm. 473; *Rector v. Rector*, 3 Gilm. 105; *Thompson v. Alexander*, 11 Ill. 54; *Burnap v. Marsh*, 13 Ill. 535; *Trustees v. Chamberlain*, 14 Ill. 495; *Ryan v. Jones*, 15 Ill. 1; *Watt v. Kirby*, 15 Ill. 200; *Dunlap v. Buckingham*, 16 Ill.

PLEA OF INFANCY.

An infant becomes of full age on the day preceding the twenty-first anniversary of his birth,¹ and females are at their majority at eighteen, in Illinois.² The implied contracts of an infant for necessities are binding upon him.³ What are necessities is determined by the court; whether furnished, and their value, by the jury.⁴ An infant is not liable for repairs on his dwelling house, although he made a contract therefor, and such repairs were necessary to prevent an immediate and serious injury to the house.⁵

The note of an infant is not void, but voidable, and a prom-

109; *King v. Hamilton*, 16 Ill. 190; *Walker v. Goodrich*, 16 Ill. 341; *Bourland v. Peoria*, 16 Ill. 539; *Baker v. Brown*, 18 Ill. 91; *Stevenson v. Westfall*, 18 Ill. 209; *Van Alstine v. Lemons*, 19 Ill. 394; *Campbell v. Vinning*, 23 Ill. 525; *Campbell v. Harris*, 30 Ill. 395; *Baker v. Backus*, 32 Ill. 79; *Hitt v. Sharer*, 34 Ill. 9; *Avery v. Babcock*, 35 Ill. 175; *Ballenger v. McKee*, 36 Ill. 255; *Wells v. Miller*, 45 Ill. 33; *Milner v. Briggs*, 45 Ill. 349; *Mason v. Tiffany*, 45 Ill. 392; *Lyon v. Robbins*, 46 Ill. 276; *Simmons v. Butters*, 48 Ill. 226; *Zacharie v. Godfrey*, 50 Ill. 186; *Cutter v. Jones*, 52 Ill. 84; *Henry Co. v. Drain Co.*, 52 Ill. 299; *Roberts v. Fleming*, 53 Ill. 196; *Dolton v. Erb*, 53 Ill. 289; *Sale v. Fike*, 54 Ill. 292; *Governor v. Woodworth*, 63 Ill. 254; *Freeman v. Freeman*, 65 Ill. 106; *Hallesy v. Jackson*, 66 Ill. 139; *McIntosh v. Saunders*, 68 Ill. 128; *Galbraith v. Littiech*, 73 Ill. 209; *Lane v. People*, 76 Ill. 300; *Logan Co. v. City*, 81 Ill. 156; *Leroy v. City*, 81 Ill. 114; *Hayward v. Gunn*, 82 Ill. 385; *Keil v. Healey*, 84 Ill. 104; *Emmons v. Moore*, 85 Ill. 304; *Foster v. Letz*, 86 Ill. 412; *Emory v. Keighan*, 88 Ill. 482; *Schillo v. McEwen*, 90 Ill. 77; *James v. R. R. Co.*, 91 Ill. 554; *Ramsey v. Clinton*, 92 Ill. 225; *Bemis v.*

Stanley, 93 Ill. 230; *Lambkin v. People*, 94 Ill. 501; *Holmes v. R. R. Co.*, 94 Ill. 439; *Piatt Co. v. Goodell*, 97 Ill. 84; *Walden v. Karr*, 88 Ill. 49; *Dodge v. Cole*, 97 Ill. 338; *Wernse v. Hall*, 101 Ill. 423; *Bonham v. People*, 102 Ill. 434; *Lee v. Mound*, 118 Ill. 312; *Vigus v. O'Bannon*, 118 Ill. 339; *Bartelott v. Bank*, 119 Ill. 259; *Steere v. Brownell*, 124 Ill. 27; *Whittaker v. Crow*, 132 Ill. 627; *Wood v. Williams*, 142 Ill. 269; *Kreiz v. Behrensmeyer*, 149 Ill. 496; *Bank v. Coleman*, 11 Bradw. 508; *R. R. Co. v. Wilcox*, 12 Bradw. 43; *Bowles v. Keator*, 47 Ill. App. 98; *Hill v. Sommer*, 55 Ill. App. 345; *Grant v. Odiorne*, 43 Ill. App. 402; *Parks v. Cadwallader*, 53 Ill. App. 236; *Green v. Baird*, 53 Ill. App. 211; same case, 61 Ill. App. 72; *Trustees v. Arnold*, 58 Ill. App. 103.

¹ *Wells v. Wells*. 6 Ind. 447.

² *Kester v. Stark*, 19 Ill. 328; *Stevenson v. Westfall*, 18 Ill. 209.

³ *Cole v. Pennoyer*, 14 Ill. 158; 2 Md. Ch. Decis. 81; *Squier v. Hydiff*, 9 Mich. 274; *Locke v. Smith*, 41 N. H. 346.

⁴ *Henderson v. Fox*, 5 Ind. 489.

⁵ *Tupper v. Cadwell*, 12 Metcalf 559; see *McCarty v. Carter*, 49 Ill. 53.

ise to pay, made by him after he becomes of age, renders the note valid. If the promise is conditional, performance or the happening of the condition must be affirmatively shown, to sustain an action. A promise to pay as soon as he could, is conditional, and unavailing without proof of ability.¹ A negotiable note given by an infant, even for necessities, is voidable.²

Where a minor contracted to work nine months, but only worked one month and a half, and then ceased, it was held that he was not bound by his contract, and could recover from his employer the value of the services rendered.³ An infant can not bind himself by bond; and if he has made a bond during infancy, and after he comes of age makes a parol promise to pay a smaller sum, in lieu of the amount of the bond, the suit should be brought on the parol promise.⁴

To make a voidable contract with an infant binding upon him, he must expressly ratify it after he attains full age; and a ratification will not be inferred from a mere acknowledgment of the debt. A promise to pay, or a direct confirmation after the person has attained his full age, is evidence of such ratification;⁵ and it must be made with a full knowledge that the party is not liable by law.⁶ It must be voluntary, and not under terror of an arrest, and must be made before the commencement of the action.⁷

Where an infant, upon being applied to for payment of a note made by him during his infancy, acknowledged that the money was due, and promised that on his return to his home he would endeavor to procure it, and send it to his creditor, it was held that there was a sufficient ratification of the original promise.⁸

¹ *Everson v. Carpenter*, 17 Wend. 419; *Goodsell v. Myers*, 3 Wend. 479; *Reynolds v. McCurry*, 100 Ill. 356.

² *Swasey v. Adm.*, 10 Johns. 33; *Wieland v. Kobick*, 110 Ill. 16; *Norton v. Steward*, 5 Bradw. 533.

³ *Ray v. Haines*, 52 Ill. 485.

⁴ *Bliss v. Perryman*, 1 Scam. 484; see 1 Parsons Cont. 323, 325, 326; *Field v. Herrick*, 101 Ill. 110.

⁵ *Conkling v. Ogburn*, 7 Ind. 553;

Smith v. Mayo, 9 Mass. 64; *Martin v. Mayo*, 10 Mass. 140; *Whitney v. Dutch*, 14 Mass. 457; *Ford v. Phillips*, 1 Pick. 202; *Thompson v. Lay*, 4 Pick. 48.

⁶ *Smith v. Mayo*, 9 Mass. 62; *Ford v. Phillips*, 1 Pick. 202; see *Bennett v. McLaughlin*, 13 Bradw. 349.

⁷ *Smith v. Mayo*, 9 Mass. 62; *Ford v. Phillips*, 1 Pick. 202.

⁸ *Whitney v. Dutch*, 14 Mass. 457.

The ratification of an infant's contract should be a promise to a party in interest, or his agent; and such ratification should be equivalent to a new contract.¹ If after becoming of age he does any act clearly showing an intention to affirm a contract, he can not afterward repudiate it.²

Contracts made by an infant are not void, but voidable only, and by the infant alone.³ It is a personal privilege, of which none can take advantage but the infant.⁴ Infancy in legal proceedings will not, as a general rule, be presumed. It must be pleaded and proved, as the case may require.⁵ But infancy may be given in evidence under the general issue, in assumpsit, though it is in general better to plead it.⁶ When infancy is alleged, the burden of proof devolves upon him who alleges it.⁷ But if a new promise is replied, the infancy is admitted.⁸

Where one of two defendants pleads his infancy, it has been held that the plaintiff may enter a *nolle prosequi* as to him, and proceed to judgment against the other defendant; or the jury may find a verdict for the infant defendant, and a verdict for the plaintiff against the other defendant.⁹ This may doubtless be done under the practice act of Illinois, but the contrary seems to have been the rule at common law.¹⁰

A judgment against an infant, without first appointing a guardian *ad litem*, is erroneous.¹¹ Such a judgment may be set aside in the court where it is rendered, on motion; and when the judgment has been set aside, the defendant may make any defense to which he may be entitled.¹² An exchange of property made by a minor is voidable.¹³ See further, as to

¹ *Goodsell v. Myers*, 3 Wend. 479; *Mayer v. McLure*, 36 Miss. 389.

² *Curry v. Plow Co.*, 55 Ill. App. 82.

³ *Stocum v. Hooker*, 13 Barb. 536.

⁴ 2 Kent Com. 249; 2 Parsons on Con. 275; *Van Bramer v. Cooper*, 2 Johns. 279; *Jackson v. Todd*, 6 Johns. 257; *Campbell v. Wilson*, 23 Texas 252.

⁵ *Pitcher v. Laycock*, 7 Ind. 398.

⁶ 1 Chit. Pl. 417, 421; see *Curry v. Plow Co.*, 55 Ill. App. 82.

⁷ *Greenleaf Ev.*, § 81.

⁸ *Goodsell v. Myers*, 3 Wend. 479.

⁹ *Hartness v. Thompson*, 5 Johns. 160; *Woodward v. Newhall*, 1 Pick. 500; *Niles v. Drake*, 17 Pick. 516; *Cuts v. Gordon*, 13 Maine 474; *Judson v. Gibbons*, 5 Wend. 228.

¹⁰ 1 Chit. Pl. 35; *Chandler v. Parker*, 3 Esp. 76; *Tidd's Pr.*, 7th Ed., 710.

¹¹ *McDaniel v. Correll*, 19 Ill. 226; *Crocker v. Smith*, 10 Bradw. 376; *Lloyd v. Kirkwood*, 112 Ill. 329; *Milard v. Marmon*, 116 Ill. 649.

¹² *Peak v. Shasted*, 21 Ill. 137; *Lemon v. Sweeney*, 6 Bradw. 507.

¹³ *Williams v. Brown*, 34 Me. 594.

the law in respect to infancy, in Illinois, the additional cases given in the note.¹

No. 90. Plea of infancy.

(As in No. 85, ante, to the asterisk, and then proceed:) that he, the defendant, at the time of the making the several supposed promises in the said declaration mentioned, was an infant within the age of twenty-one years, to wit, of the age of — years: And this he is ready to verify; wherefore he prays judgment, etc. (concluding as in No. 85).

If the defendant is still an infant, the commencement of the first plea should be (after entitling it) as follows:

“And the said C. D., by G. H., admitted by the court here as guardian of the said C. D., to defend for him, the said C. D., who is an infant under the age of twenty-one years, comes, etc., and says,” etc.

No. 91. Replication to No. 90, denying infancy.

(As in No. 86, ante, to the asterisk, and then proceed:) that the defendant, at the time of making of the said several promises, was of the full age of twenty-one years, and not within the age of twenty-one years, as the defendant has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

¹*French v. Creath*, Breese, 31; *Greer v. Wheeler*, 1 Scam. 554; *Thornton v. Vaughn*, 2 Scam. 218; *McClay v. Norris*, 4 Gilm. 370; *Smith v. Sackett*, 5 Gilm. 534; *Sconce v. Whitney*, 12 Ill. 150; *Hitt v. Ormsby*, 12 Ill. 166; *Enos v. Capps*, 12 Ill. 255; *Hamilton v. Gilman*, 12 Ill. 266; *Dufield v. Cross*, 12 Ill. 397; *Holmes v. Field*, 12 Ill. 422; *Walker v. Ellis*, 12 Ill. 470; *Enos v. Capps*, 15 Ill. 277; *Tuttle v. Garrett*, 16 Ill. 354; *Cost v. Rose*, 17 Ill. 276; *Masterson v. Wiswold*, 18 Ill. 48; *Sinklear v. Emert*, 18 Ill. 64; *Carr v. Fielden*, 18 Ill. 77; *Peak v. Pricer*, 21 Ill. 164; *Chaffin v. Kimball*, 23 Ill. 36; *Blankenship v. Stout*, 25 Ill. 132; *Tibbs v. Allen*, 27 Ill. 119; *Reddick v. Bank*, 27 Ill. 148; *Cox v. Reed*, 27 Ill. 434; *Burger v. Potter*, 32 Ill. 66; *Waugh v. Robbins*, 33 Ill. 182; *Black v. Hills*, 36 Ill. 377; *Davidson v. Young*, 38 Ill. 145; *Kuchenheiser v. Beckert*, 41 Ill. 172; *McDermid v. Russell*, 41 Ill. 490; *Caldwell v. Sherman*, 45 Ill. 338; *Quigley v. Roberts*, 44 Ill. 503; *Preston v. Hodgen*, 50 Ill. 56; *Kane Co. v. Herrington*, 50 Ill. 232; *Barnes v. Hazelton*, 50 Ill. 429; *Hess v. Voss*, 52 Ill. 473; *Hoyt v. Swar*, 53 Ill. 134; *Greenman v. Harvey*, 53 Ill. 386; *Fischer v. Fischer*, 54 Ill. 231; *Hickenbotham v. Blackledge*, 54 Ill. 316; *Matthews v. Cowan*, 59 Ill. 341; *Thomas v. Adams*, 59 Ill. 223; *Scott v. White*, 71 Ill. 288; *Reed v. Degener*, 82 Ill. 508; *Patterson v. Pullman*, 104 Ill. 80; *Beederman v. O'Conner*, 117 Ill. 496; *Allen v. Jacobs*, 14 Bradw. 277; *Ashlock v. Vivell*, 29 Ill. App. 393; *McLean v. Wilson*, 36 Ill. App. 658; *Myer v. Rehkoﬀ*, 30 Ill. App. 210; *M. Co. v. Spehr*, 46 Ill. App. 24.

No. 92. Replication to No. 90, that goods, etc., were necessities.

(As in No. 86, ante, to the asterisk, and then proceed :) that the said goods, chattels and effects (or whatever the declaration charges), in the said declaration mentioned to have been sold and delivered by the plaintiff to the defendant, were necessities suitable to the condition and estate of the defendant: And this the plaintiff is ready to verify; wherefore he prays judgment, and his damages, etc., to be adjudged to him, etc.

For a replication of this kind as to certain counts, with a *nolle prosequi* as to the rest of the counts, see Chit. Pl. 1146, and 2 Swan's Pr. 695.

No. 93. Rejoinder to the last replication, denying it.

(As in No. 89, ante, to the asterisk, and then proceed :) that the said goods, chattels and effects, in the said declaration mentioned to have been sold and delivered by the plaintiff to the defendant, were not necessities suitable to the condition and estate of the defendant, as the plaintiff has above in that replication alleged: And of this the defendant puts himself upon the country, etc.

No. 94. Replication to No. 90, that defendant confirmed his promises after coming of age.¹

(As in No. 86, ante, to asterisk, and then proceed :) that the defendant, after the making of the said several promises, and before the commencement of this suit, to wit, on, etc., attained his full age of twenty-one years; and that he, the defendant, after he had so attained his age of twenty-one years, and before the commencement of this suit, to wit, on, etc., in the county aforesaid, ratified and confirmed the said several promises: And this the plaintiff is ready to verify; wherefore he prays judgment, and his damages, etc., to be adjudged to him, etc.

No. 95. Rejoinder to the last replication, denying it.

(As in No. 89, ante, to the asterisk, and then proceed :) that he did not, after he attained the age of twenty-one years, and before the commencement of this suit, ratify or confirm the said several supposed promises, or any or either of them, in manner and form as the plaintiff has above in that replication alleged: And of this the defendant puts himself upon the country, etc.

PLEA OF THE STATUTE OF FRAUDS.

The defense of the statute of frauds must be set up and relied upon in some manner,² but it may either be pleaded

¹ See another form, 3 Chit. Pl. 1147.

² *Thornton v. Henry*, 2 Scam. 219; *Lear v. Chouteau*, 23 Ill. 39; *War-*

specially or shown under the general issue.¹ Advantage may be taken of the statute, under the plea of *non assumpsit*, by objection to all verbal evidence offered in support of the declaration.² It would seem to have been usual in England to prove this defense under the general issue, but the defendant was *at liberty* to plead it specially.³

On appeal from a justice's court, where the proceedings are *ore tenus*, the statute of frauds is presumed to have been pleaded, if necessary to the defense.⁴ The plea of the statute of frauds is a personal privilege, like the plea of infancy, which a party may waive. Another person can not plead it for him, or compel him to plead it.⁵ It has been held that the statute has not changed the mode of pleading, and hence that the declaration need not aver that the agreement was in writing, but the defendant may rely upon the statute under the evidence.⁶

To take a case out of the statute, no particular form of words is necessary in the written agreement or memorandum; anything from which the intention may be gathered is sufficient—any kind of a *writing*, from a solemn deed down to mere memoranda in books, papers or letters. These must be certain enough on their face, or by reference, to show the parties, the interest or property to be affected, and the consideration.⁷ The person to be charged, or his agent, must sign the agreement; and parol proof of the agency is sufficient

ren v. Dickson, 27 Ill. 115; *Hull v. Peer*, 27 Ill. 312; *Boston v. Nichols*, 47 Ill. 352; *Dock Co. v. Kinzie*, 49 Ill. 289; *Beard v. Converse*, 84 Ill. 512; *Finucan v. Kendig*, 109 Ill. 198; *Gordon v. Reynolds*, 114 Ill. 118; *Bragg v. Olson*, 128 Ill. 545; *Hogan v. Easterday*, 58 Ill. App. 45; *McClure v. Otrich*, 118 Ill. 320.

¹ *Ruggles v. Gatton*, 50 Ill. 412; *Myers v. Morse*, 15 Johns. 425. As to general issue, see 1 Chit. Pl. 417; Gould's Pl. 307; *Meyers v. Schemp*, 67 Ill. 469; *Beard v. Converse*, 84 Ill. 512; *Finucan v. Kendig*, 109 Ill. 198.

² Gould's Pl. 307; *Beard v. Converse*, 84 Ill. 512; *Durant v. Rogers*, 71 Ill. 121.

³ 1 Chit. Pl. 421.

⁴ *Comstock v. Ward*, 22 Ill. 248; *Williams v. Corbett*, 28 Ill. 262; *Deyo v. Ferris*, 22 Ill. App. 154.

⁵ *McCoy v. Williams*, 1 Gilm. 584; *Dock Co. v. Kinzie*, 49 Ill. 289; *Gordon v. Mill Co.*, 20 Bradw. 559; *King v. Bushnell*, 121 Ill. 658; *Kelly v. Kendall*, 118 Ill. 652; *Singer v. Carpenter*, 125 Ill. 119.

⁶ *Elting v. Vanderlyn*, 4 Johns. 237; see Gould's Pl. 307; *Ruggles v. Gatton*, 50 Ill. 412; *Struble v. Hake*, 14 Bradw. 546; *Darst v. Bates*, 95 Ill. 495.

⁷ *McConnell v. Brillhart*, 17 Ill. 254; *Doty v. Wilder*, 15 Ill. 407; *Farwell v. Lowther*, 18 Ill. 252;

to hold the party who has acted by agent. The signing may be in the caption, in the body, or at the end of the instrument. The agreement must be signed with an intent to enter into it, and must be mutual and upon good consideration.¹

When, in performance of a verbal contract originally within the statute, money has been paid, it can not be recovered.²

Collateral and original undertakings.—If a promise to answer for a debt incurred for the benefit of another is an original undertaking, it need not be in writing;³ but there must be a consideration; and the plaintiff must declare as upon an original contract.⁴

To render a promise to pay the debt of another, an original undertaking, some benefit must move between the promisee and promisor, and the original debt must be surrendered.⁵

Where, on a sale of goods, a third person guarantees that the purchaser will pay for them, and thereupon the goods are delivered, this is a collateral undertaking; but there is no necessity for any distinct consideration passing between the seller and the guarantor, for it being all one entire transaction, the delivery of the goods to the purchaser will support not only his promise but the promise of the guarantor; and such a

Loomis v. Newhall, 15 Pick. 159; see *Burke v. Haley*, 2 Gilm. 614; *Underwood v. Hossack*, 38 Ill. 44; *Lasher v. Gardner*, 124 Ill. 44.

¹ *McConnell v. Brillhart*, 17 Ill. 354; *Johnson v. Dodge*, 17 Ill. 433; *R. R. Co. v. Bronkerhoff*, 21 Wend. 139; see *Farwell v. Lowther*, 18 Ill. 252; *Swanzy v. Moore*, 23 Ill. 63; *Orne v. Cook*, 31 Ill. 239; *Curtis v. Sage*, 35 Ill. 122; *Bennett v. Matson*, 41 Ill. 332; *Perkins v. Hadsell*, 50 Ill. 216.

² *James v. Morey*, 44 Ill. 352; see *Blunt v. Tomlin*, 27 Ill. 93; *Hull v. Peer*, 27 Ill. 312; see *Frazer v. Howe*, 106 Ill. 563.

³ *Scudder v. Carter*, 43 Ill. App. 252; *Bacharach v. McCurrach*, 43 Ill. App. 584; *Eddy v. Roberts*, 17

Ill. 505; *Williams v. Corbett*, 28 Ill. 262; *Geary v. O'Neill*, 73 Ill. 593; *Hartley v. Varner*, 88 Ill. 561; *Ressetter v. Waterman*, 151 Ill. 169.

⁴ *Hite v. Wells*, 17 Ill. 88; *Borchsenius v. Canutson*, 100 Ill. 82.

⁵ *Borchsenius v. Canutson*, 100 Ill. 92; *Eddy v. Roberts*, 17 Ill. 505; *Wilson v. Bevans*, 58 Ill. 232; *Hartley v. Warner*, 88 Ill. 561; *Williams v. Corbett*, 28 Ill. 262; *Bunting v. Darbyshire*, 75 Ill. 408; *Murto v. McKnight*, 28 Ill. App. 238; *Bank v. Waterman*, 30 Ill. App. 535; same case, 134 Ill. 467; *Bacharach v. McCurrach*, 43 Ill. App. 584; *Ames v. Foster*, 106 Mass. 403; *Allen v. Thompson*, 10 N. Y. 32; *Ressetter v. Waterman*, 151 Ill. 169; *Scudder v. Carter*, 43 Ill. App. 252.

guaranty, in writing, is valid without any further consideration.¹

If the whole credit is given to the person who comes in to answer for another, his undertaking is not collateral. Where one person procures services to be performed for, or goods to be delivered to, another, he will be held liable for their value;² but if services are performed, or goods sold, on the credit of him who receives them, a third person who verbally agrees to be responsible for the price thereof will not be liable in an action on his promise. The real question is, in such case, to whom was the credit given? If to another than the defendant he is not liable.³

If goods purchased were charged to the person who bought them, this is strong evidence that the credit was given to him, but it is not conclusive, and may be rebutted.⁴

The slightest damage to the plaintiff, or benefit to the defendant, affords a sufficient consideration to support a promise to pay.⁵ Whether an undertaking is original or collateral is to be determined, not from the particular words used, but from all the circumstances of the transaction.⁶ Where the moving consideration for the promise is the liability of the third person, the promise must be in writing;⁷ and a consideration is necessary to support any promise, whether in writ-

¹ *Leonard v. Vredenburg*, 8 Johns. 29; see *Eddy v. Roberts*, 17 Ill. 505.

² *Hughes v. Atkins*, 41 Ill. 213; *Gallup v. Smith*, 24 Ill. 586; *Ruggles v. Gatton*, 50 Ill. 412; see *Scott v. Thomas*, 1 Scam. 58; *Hite v. Wells*, 17 Ill. 88; *Orne v. Cook*, 31 Ill. 239; *Rabermann v. Wiscamp*, 54 Ill. 179; *Coal Co. v. Liddell*, 69 Ill. 639; *Snell Cheney*, 88 Ill. 258; *Hartley v. Varner*, 88 Ill. 561.

³ *Hughes v. Atkins*, 41 Ill. 213; *Hardman v. Bradley*, 85 Ill. 562; *Geary v. O'Neill*, 73 Ill. 593; *Clifford v. Luhring*, 69 Ill. 401; *Denton v. Jackson*, 106 Ill. 433.

⁴ *Ruggles v. Gatton*, 50 Ill. 412; *Borchsenius v. Canutson*, 100 Ill. 82.

⁵ *Cornell v. Electric Co.*, 61 Ill. App. 325; *Webbe v. Stone Co.*, 58 Ill. App. 222; *Walker v. Sherman*, 11 Met. 170.

⁶ *Hite v. Wells*, 17 Ill. 88; *Blank v. Dreher*, 25 Ill. 331; *Moshier v. Arnold*, 87 Ill. 18; *Schoenfeld v. Brown*, 78 Ill. 487; *Owen v. Stevens*, 78 Ill. 462; *Ins. Co. v. Olcott*, 97 Ill. 439; *Bank v. Waterman*, 134 Ill. 461.

⁷ *Scott v. Thomas*, 1 Scam. 58; *Hite v. Wells*, 17 Ill. 88; *Eddy v. Rogers*, 17 Ill. 505; *Williams v. Corbett*, 28 Ill. 262; *Frame v. August*, 88 Ill. 424; *Power v. Rankin*, 114 Ill. 52.

ing or not.¹ A verbal promise to accept or pay an existing or non-existing bill of exchange, is not within the statute of frauds, and is valid.²

Where a person enters into a verbal contract with another, for the benefit of a third person, such third person may maintain an action for a breach of the contract, and such a contract is not within the statute of frauds.³ And where A. owes B., and B. owes C., and it is agreed among them that the debt from B. to C. shall be canceled, and that A. shall pay his debt to C., the agreement is binding, although not in writing.⁴ A contract for services, which by its terms is not to be performed within the space of one year from the making thereof, is within the statute of frauds, and can not be enforced.⁵

The cases relating to the statute of frauds, decided in the supreme court of Illinois, and not already cited, are given in the note below.⁶ Many of these have relation to that branch of the statute which refers to contracts concerning lands.

¹ *Hite v. Wells*, 17 Ill. 88; *Eddy v. Roberts*, 17 Ill. 505; *Durant v. Rogers*, 71 Ill. 121; *Patmor v. Haggard*, 78 Ill. 607; *Laidlow v. Hatch*, 75 Ill. 11; *Graham v. Mason*, 17 Bradw. 399.

² *Nelson v. Bank*, 48 Ill. 36; see *Jones v. Bank*, 34 Ill. 319; *Mason v. Dousay*, 35 Ill. 424.

³ *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 19 Ill. 88; *Prather v. Vineyard*, 4 Gilm. 40; *Wilson v. Bevans*, 58 Ill. 232; *Walden v. Karr*, 88 Ill. 49; *Thompson v. Dearborn*, 107 Ill. 87; *Parsons on Cont.* 302, 307, 308, and notes *m* and *w*.

⁴ *Corbin v. McChesney*, 16 Ill. 232; see *Prather v. Vineyard*, 4 Gilm. 40; *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 19 Ill. 88; *Bristow v. Lane*, 21 Ill. 194; *Lindley v. Simpson*, 45 Ill. App. 648.

⁵ *Steel Works v. Atkinson*, 68 Ill. 421; *Haynes v. Mason*, 30 Ill. App. 85; *Schanzenbach v. Brough*, 58 Ill. App. 526.

⁶ *Everett v. Morrison*, Breese 79; *Whitney v. Cochran*, 1 Scam. 209; *Thornton v. Davenport*, 1 Scam. 296; *Prevo v. Lathrop*, 1 Scam. 305; *Updike v. Armstrong*, 3 Scam. 564; *Perry v. McHenry*, 13 Ill. 227; *Jefferson v. Ferguson*, 13 Ill. 33; *Davis v. Hopkins*, 15 Ill. 519; *Ballingall v. Bradley*, 16 Ill. 373; *Bourland v. Peoria Co.*, 16 Ill. 538; *McConnell v. Brillhart*, 17 Ill. 354; *Stevens v. Wheeler*, 25 Ill. 300; *Bozza v. Rowe*, 30 Ill. 198; *Mason v. Blair*, 33 Ill. 195; *Keys v. Test*, 33 Ill. 316; *Parsons v. Coal Co.*, 38 Ill. 430; *Fitzsimmons v. Allen*, 39 Ill. 440; *Chicago v. Hyde*, 40 Ill. 150; *Bright v. Bright*, 41 Ill. 97; *Powell v. Rich*, 41 Ill. 466; *Holmes v. Holmes*, 44 Ill. 168; *Moore v. Titman*, 44 Ill. 367; *Ruggles v. Gatton*, 50 Ill. 412; *Holmes v. Holmes*, 49 Ill. 31; *Kane v. Harrington*, 50 Ill. 232; *Lantry v. Lantry*, 51 Ill. 458; *Runde v. Runde*, 59 Ill. 98; *Warner v. Hale*, 65 Ill. 395; *Cox v. Straisser*, 62 Ill. 383; *White v.*

No. 96. Plea of the statute of frauds—Agreement not to be performed within a year, and not in writing.

(*First plea, non assumpsit, as ante, No. 82; second plea as ante, No. 85, to the asterisk, and then proceed:*) that each and every one of the several supposed promises in the said declaration mentioned was an agreement which was not to be performed within the space of one year from the time of the making thereof, to wit, the — day of —, in the year 18—, and was not nor is, nor was nor is any memorandum or note thereof, in writing, signed by the defendant, or by any other person thereunto by him lawfully authorized, according to the form of the statute, etc.: And this, etc. (*conclude with a verification, as ante, No. 85.*)

No. 97. Replication to No. 96, that agreement was to be performed within a year.

(*As in No. 86, ante, to the asterisk, and then proceed:*) that each and every one of the said several promises was an agreement which was to be performed within the space of one year from the time of making thereof as aforesaid, and not an agreement which was not to be performed within the space of one year from that time, as the defendant has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

The plaintiff may rely that the agreement was in writing and signed, etc., and set out the agreement in the replication.¹

No. 98. Plea of the statute of frauds—Promise was to answer for the debt of another person, and was not in writing.

(*First plea, non assumpsit, as in No. 82, ante; second plea as ante, No. 85, to the asterisk, and then proceed:*) that each and every one of the several

Maitland, 71 Ill. 250; *Scott v. White*, 71 Ill. 287; *Carpenter v. Davis*, 74 Ill. 14; *Wheeler v. Frankenthal*, 78 Ill. 124; *Tel. Co. v. R. R. Co.*, 86 Ill. 246; *Hayward v. Gunn*, 82 Ill. 385; *Bradley v. Coolbaugh*, 91 Ill. 148; *Kershaw v. Kershaw*, 102 Ill. 307; *Albertson v. Ashton*, 102 Ill. 50; *Warren v. Warren*, 105 Ill. 568; *Ins. Co. v. White*, 106 Ill. 67; *Chappell v. McKnight*, 108 Ill. 570; *Whitsett v. Trustees*, 110 Ill. 125; *Bay v. Williams*, 112 Ill. 96; *Fishbeck v. Gross*, 112 Ill. 214; *Irwin v. Drake*, 114 Ill. 305; *Clark v. Clark*, 122 Ill. 391; *Vallette v. Tedens*, 122 Ill. 610; *Cloud v. Greasley*, 125 Ill. 316; *McGinnus*

v. Fernandes, 126 Ill. 230; *Dougherty v. Cuttell*, 129 Ill. 438; *Allison v. Perry*, 130 Ill. 16; *Morrison v. Herrick*, 130 Ill. 631; *Koch v. Nat'l Union*, 137 Ill. 497; *Neagle v. Kelly*, 146 Ill. 460; *Leavitt v. Stearn*, 159 Ill. 526; *Mathers v. Carter*, 7 Bradw. 225; *Geelan v. Reid*, 22 Ill. App. 165; *People v. Brooks*, 22 Ill. App. 594; *Murto v. McKnight*, 28 Ill. App. 248; *Ingraham v. Strong*, 41 Ill. App. 46; *Tanquary v. Walker*, 47 Ill. App. 451; *McCarland v. Doorley*, 47 Ill. App. 513; *Stein v. Bleake*, 56 Ill. App. 525.

¹ 11 Price, 494.

supposed promises in the said declaration mentioned was a special promise to answer for the debt of another person, to wit, one (or "the said") L. M., and was not nor is, nor was nor is any memorandum or note thereof, in writing, signed by the defendant, or by any other person thereunto by him lawfully authorized, according to the form of the statute, etc.: And this, etc. (*conclude with a verification, as in No. 85, ante*).

No. 99. Replication to No. 98, that the promise was not to answer for the debt of another person.

(*As in No. 86, ante, to the asterisk, and then proceed:*) that the several promises aforesaid were not special promises, nor was either of them a special promise, to answer for the debt of the said L. M., as the defendant has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

The above forms of pleas can be readily adapted to any other cases within the statute—promises by executors or administrators, agreements upon consideration of marriage, or contracts concerning lands, etc.

PLEA OF FRAUD.

A plea which attempts to set up fraud should aver a *scienter*,¹ but it would seem that an averment that the plaintiff "falsely and fraudulently represented," etc., is sufficient.² It is held that the burden of charging, as of proving, fraud, is on the party alleging it; and that while it is not necessary or proper that he should spread out, in his pleadings, the *evidence* on which he relies, he must aver fully and explicitly the *facts* constituting the alleged fraud, and not mere conclusions.³ But it seems that at common law it is in general unnecessary to state the particulars of fraud, at least in a replication.⁴ Fraud must always be proved; the law never presumes it.⁵ It may, however, be proved by circumstances.⁶

¹ *White v. Watkins*, 23 Ill. 480.

² *Richards v. Betzer*, 53 Ill. 466; 1 Chit. Pl. 338.

³ *Keller v. Vowell*, 17 Ark. 445; *Keller v. Johnson*, 11 Ind. 337; *Cole v. O. H. Co.*, 79 Ill. 96; *Jones v. Albee*, 70 Ill. 34; *Hopkins v. Woodward*, 75 Ill. 62; *Ward v. Luneen*, 25 Ill. App. 160; *Endsley v. John*, 120 Ill. 475; *Gas Co. v. Higbie*, 134 Ill. 557; *Stunz v. Stunz*, 131 Ill. 318.

⁴ 1 Chit. Pl. 502; 2 Swan's Pr. 742.

⁵ *Wright v. Grover*, 27 Ill. 426; *Stewart v. English*, 6 Ind. 167; 1 Chit. Pl. 204; *Kiehn v. Bestor*, 30 Ill. App. 458; *E. St. L. v. Trustees*, 123 Ill. 643.

⁶ *Bryant v. Simoneau*, 15 Ill. 324; *Bullock v. Narrott*, 49 Ill. 62; *Boies v. Henney*, 32 Ill. 130; *Bowden v. Bowden*, 75 Ill. 143; *Edleman v. By-*

Fraud may consist in making a false representation with the knowledge at the time that it is false, and with a design to deceive and defraud, or in the willful concealment of the truth for a similar purpose.¹ It can not exist without an intention to deceive.²

Fraud vitiates all acts, as between the parties to such acts, and is cognizable in a court of law, as well as in equity.³ It is not every false affirmation that amounts to a fraud. A knowledge of the falsehood of the representation must rest with the person making it, and he must use some means to deceive to make it a fraud.⁴

Where a transaction is tainted with fraud, as between the parties to the fraud, a court will not assist either, but will leave them in the position where they have placed themselves.⁵ In actions upon instruments which are covered by the statute concerning negotiable instruments, fraud in the consideration may be shown; but as to a sealed instrument not within the statute, fraud in the consideration can not at law be made a defense.⁶

Where fraudulent representations are made with the intention to deceive and defraud the person to whom they are made, and he thereby suffers, the person making such representations

ers, 75 Ill. 367; *Johnson v. Worthington*, 30 Ill. App. 617; *Fowler v. Loomis*, 37 Ill. App. 363.

¹ *Sims v. Klein*, Breese 302; *McConnell v. Wilcox*, 1 Scam. 344; *Kohe v. Lindley*, 39 Ill. 195; *Mitchell v. Deeds*, 49 Ill. 416; see *Lockridge v. Foster*, 4 Scam. 569; *Miller v. Craig*, 36 Ill. 109; 2 Kent's Com. 490; *Whitside v. Taylor*, 105 Ill. 496.

² *Miller v. Howell*, 1 Scam. 499; *Walker v. Hough*, 59 Ill. 375; *Ry. Co. v. Rice*, 85 Ill. 406; *Wharf v. Roberts*, 88 Ill. 426.

³ *Express Co. v. Willsie*, 79 Ill. 92; *Jamison v. Beaubien*, 3 Scam. 113; *Lowry v. Orr*, 1 Gilm. 70; *Rogers v. Brent*, 5 Gilm. 573; *Slack v. McLagan*, 15 Ill. 242.

⁴ *Sims v. Klein*, Breese 302; *Dunbar v. Bonesteel*, 3 Scam. 32; *Eames v. Morgan*, 37 Ill. 260; *Richards v. Betzer*, 53 Ill. 466; see *Merryman v. David*, 31 Ill. 404; *Fish v. Cleland*, 33 Ill. 238; *Miller v. Young*, 33 Ill. 355; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Hewett v. Johnson*, 72 Ill. 513; *Kenner v. Harding*, 85 Ill. 264; *Ry. Co. v. Rice*, 85 Ill. 406; *Bond v. Ramsey*, 89 Ill. 29.

⁵ *Miller v. Marckle*, 21 Ill. 152; *Winston v. McFarland*, 22 Ill. 38; see *Anderson v. Warne*, 71 Ill. 20.

⁶ *Hawkins v. Harding*, 37 Ill. App. 564.

will be liable.¹ But if such false representations are made in the belief that they are true, and the person making them has no reason to believe them to be false, they will not be held fraudulent, and will not render him liable.²

Evidence of oral representations, made by a party before the making of a written contract, may be introduced to show fraud;³ and a fraudulent intent may be found from the act of a purchaser after the sale.⁴ All the members of a partnership are liable for the fraud of one of them, or of their agents in the course of their employment, in the sale of partnership property.⁵

Under the statute of Illinois, the plea of fraud in obtaining the *making* of the instrument is good against an innocent assignee.⁶ The plea of fraud in obtaining the execution of a note and mortgage may be set up as well in a suit by an assignee as in a suit by the person to whom they were made.⁷

Where the question of fraud is one of extent, it is to be determined by the jury.⁸ The fraud which will vitiate a note, in the hands of an innocent assignee, must be fraud practiced in obtaining the execution of the note. Fraud in respect to the consideration, or in the contract on which the note is given, is not sufficient.⁹

Where one who was sued on a promissory note pleaded, not that he did not know he was signing such a note, but merely that, by the terms of an instrument attached to the note when it was executed, it was only to be paid on a certain contingency, which did not happen, and that this instrument was wrongfully detached from the note after its execution, it was

¹ *Bank v. Hamilton*, 2 Ind. 457; *Eames v. Morgan*, 37 Ill. 260; see *Kohl v. Lindley*, 39 Ill. 195; *Wharf v. Roberts*, 88 Ill. 426.

² *Bank v. Hamilton*, 2 Ind. 457; *Hopper v. Sisk*, 1 Ind. 176; *Bond v. Ramsey*, 89 Ill. 29; *Grier v. Puterbaugh*, 108 Ill. 602.

³ *Holbrook v. Burt*, 22 Pick. 546; *Wilson v. Watts*, 9 Md. 356.

⁴ *Bowen v. Schuler*, 41 Ill. 192.

⁵ *Locke v. Stearns*, 1 Metc. 560.

⁶ Rev. Stat. (1893), 994; Rev. Stat.

(1895), 1062; *Starr & Curtis* 1665; *Woods v. Hynes*, 1 Scam. 103; *Mulford v. Shepard*, 1 Scam. 583; *Adams v. Woldridge*, 3 Scam. 255; *Hewitt v. Jones*, 72 Ill. 218.

⁷ *Marshall v. Billingsly*, 7 Ind. 250; *Wilson v. Miller*, 72 Ill. 616.

⁸ *Marshall v. Billingsly*, 7 Ind. 250; *Smith v. Brittenham*, 109 Ill. 541.

⁹ *Wood v. Hynes*, 1 Scam. 103; *Mulford v. Shepard*, 1 Scam. 583; *Latham v. Smith*, 45 Ill. 25; *Richelieu v. Encampment*, 140 Ill. 248.

held that these facts did not constitute fraud in obtaining the execution of the note, but fraud perpetrated after its execution, and therefore could not avail as a defense against an assignee before maturity.¹ But in a case where it appeared that the defendant, under circumstances which showed no lack of reasonable caution on his part, signed a paper which he did not know was a note at all, but was induced to believe was an instrument of an entirely different character—and it was probable that the note sued on was embraced in the paper which the defendant executed, and was afterward detached and assigned—the defense of fraud and circumvention was sustained against an assignee before maturity.²

Diligence required of maker of note.—The mere fact that a person can read will not cut him off from alleging, even against an assignee before maturity, that the execution of a promissory note made by him was obtained by fraud and circumvention. But he who signs a paper should use reasonable and ordinary precautions to avoid imposition; if able to read readily, he should examine the instrument; if unable to read, or able only to read with difficulty, he may have it read to him by some one present. He can not act recklessly, disregarding all the usual precautions, and then interpose the defense of fraud as against the assignee.³

Diligence required of assignee of note.—The assignee, equally with the maker, is bound to use proper diligence. Where strangers offer to sell promissory notes, under circumstances which ought to arouse suspicion, a purchaser of such notes, who could ascertain the truth in regard to them by inquiring of the supposed maker, will be deemed to have acted without due caution if he fails to make such inquiry.⁴

If fraud and circumvention are used in procuring the execution of a note, and the payee is a party to such fraud and

¹ *Clarke v. Johnson*, 54 Ill. 296; *Vanbrunt v. Singley*, 85 Ill. 281; *Sim v. Pyle*, 84 Ill. 271; *Stevenson v. O'Neal*, 71 Ill. 314.

² *Taylor v. Atchison*, 54 Ill. 196; *Champion v. Ulmer*, 70 Ill. 322.

³ *Taylor v. Atchison*, 54 Ill. 196; *Holmes v. Hale*, 71 Ill. 552; *Swannell*

v. Watson, 71 Ill. 456; *Ry. Co. v. Lewis*, 13 Bradw. 166; *Carroll v. People*, 13 Bradw. 206; *Brophy v. Lawler*, 107 Ill. 284; *Muhlke v. Hegerness*, 56 Ill. App. 322; see *Kingman v. Reinemer*, 58 Ill. App. 173.

⁴ *Ibid.*

circumvention, the note is void. It is otherwise if he is free from any participation in the fraud.¹ If the party defrauded acquiesces in or confirms the contract, with full knowledge of the fraud, others not defrauded or injured can not avoid the contract for him.² Advantage can not be taken of a fraud except by the party defrauded or injured.³

A surety or guarantor can not interpose the fraudulent or false representations of his principal as a defense to the payment of a note or bond, without connecting the payee with such representations.⁴

See further, as to fraud generally, the additional Illinois cases noted below.⁵

No. 100. Plea of fraud and circumvention in obtaining execution of instrument.

(*First plea, non assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed :*) that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of the said declaration mentioned, and not different causes of action; and that the execution of the writing or supposed

¹ *Easter v. Minard*, 26 Ill. 494.

² *Edmunds v. Hildreth*, 16 Ill. 214.

³ *Edmunds v. Hildreth*, 16 Ill. 214; *Walbridge v. Day*, 31 Ill. 379; *Sheldon v. Harding*, 44 Ill. 68; *Howell v. Edmonds*, 47 Ill. 79; *Machine Co. v. Buckles*, 89 Ill. 243; *Ladd v. Trustees*, 80 Ill. 233; *Mathew v. Cowan*, 59 Ill. 341; *Stoner v. Millikin*, 85 Ill. 218.

⁴ *Davis v. Buckles*, 89 Ill. 243; *Ladd v. Trustees*, 80 Ill. 233; *Smith v. Board*, 59 Ill. 413; *Stoner v. Millikin*, 85 Ill. 218.

⁵ *Towell v. Gatewood*, 2 Scam. 22; *Powell v. Jeffries*, 4 Scam. 387; *Draper v. McFarland*, 1 Gilm. 310; *Choateau v. Jones*, 11 Ill. 301; *Jefferson v. Ferguson*, 13 Ill. 33; *Nelson v. Rockwell*, 14 Ill. 375; *Clement v. Evans*, 15 Ill. 92; *Kennedy v. Northup*, 15 Ill. 148; *Grimes v. William*, 16 Ill. 47; *Waggoner v. Cooley*, 17 Ill. 239; *Brown v. Riley*, 22 Ill. 45; *Whitney v. Roberts*, 22 Ill. 381; *Warner v.*

Carleton, 22 Ill. 415; *Chaffin v. Kimball*, 23 Ill. 36; *Neece v. Haley*, 23 Ill. 416; *Bank v. Godfrey*, 23 Ill. 579; *De Wolf v. Hayden*, 24 Ill. 529; *Lloyd v. Higbie*, 25 Ill. 603; *Myers v. Kinzie*, 26 Ill. 36; *Fuller v. Paige*, 26 Ill. 358; *Moore v. Bracken*, 27 Ill. 23; *Gosney v. Frost*, 27 Ill. 53; *Scarlett v. Gorham*, 28 Ill. 319; *Nelson v. Smith*, 28 Ill. 495; *Wood v. Shaw*, 29 Ill. 444; *Perley v. Catlin*, 31 Ill. 533; *Gray v. St. John*, 35 Ill. 222; *Wightman v. Hart*, 37 Ill. 123; *Cameron v. Savage*, 37 Ill. 172; *Hessing v. McCloskey*, 37 Ill. 341; *Blue v. Blue*, 38 Ill. 9; *Lockwood v. Mills*, 39 Ill. 603; *Taylor v. Hopkins*, 40 Ill. 442; *Ryan v. Brant*, 42 Ill. 78; *Peters v. Smith*, 42 Ill. 417; *Waterman v. Donalson*, 43 Ill. 29; *Underwood v. West*, 43 Ill. 403; *Blow v. Gage*, 44 Ill. 208; *Banta v. Palmer*, 47 Ill. 99; *Shinkler v. Letcher*, 47 Ill. 216; *Johnson v. Wilson*, 33 Ill. App. 639.

promissory note in that count mentioned was obtained from the defendant, by the plaintiff, (or, if the action is by an assignee, say "by the said J. K.," the payee, or by the beneficiary,) by fraud and circumvention, that is to say, that (here set forth the facts constituting the fraud, and that the defendant, confiding, etc., executed the writing, etc.—see next form). And this, etc. (conclude with a verification, as in No. 85, ante).

*No. 101. Plea of fraud—In action by assignee of note, plea by surety that execution of note was obtained from him by fraud of payee and principal.*¹

(First plea, non assumpsit, as ante, No. 82.) And for a further plea in this behalf, the defendant E. F. says that the plaintiff ought not to have his aforesaid action against him, the said E. F., because he says, that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of the said declaration mentioned, and not different causes of action; and that the execution of the writing or supposed promissory note in that count mentioned was obtained from him, the said E. F., by the said J. K. (the payee) and the said C. D., (the principal, and co-defendant,) by the use of fraud and circumvention, that is to say, that the said J. K. and C. D., colluding to injure and defraud the said E. F., before the execution of the said writing, to wit, on the said (date of note), in the county aforesaid, falsely and fraudulently represented to the said E. F. that if he would execute the said writing as a surety for the said C. D., one L. M. would also execute the same as a co-surety; and the said J. K. and C. D. then and there falsely and fraudulently promised the said E. F. that the said writing should not be delivered to or received by the said J. K. unless the said L. M. should so execute the same as aforesaid; and thereupon the said E. F., confiding in the false and fraudulent representation and promise aforesaid, then and there executed the said writing as a surety for the said C. D., and not otherwise, and without any consideration whatsoever. And the said E. F. further says, that thereupon the said writing was by the said C. D. then and there fraudulently delivered to the said J. K., and by him fraudulently received, although the said L. M. did not nor would then or at any other time execute the said writing as a co-surety as aforesaid, or otherwise. And this, etc. (conclude with a verification, as in No. 85, ante).

No. 102. Replication to No. 100 or No. 101, denying that execution of instrument was obtained by fraud.

(As in No. 86, ante, to the asterisk, and then proceed :) that the execution of the said promissory note was obtained fairly, and not by the fraud or circumvention of the plaintiff, (or, if action is by an assignee "of the said J. K.") in manner and form as the defendant (or "the said E. F.") has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

¹ *Easter v. Minard*, 26 Ill. 494.

PLEA OF USURY.

The act of 1879—in relation to interest and usury—as amended by act of 1891, provides that parties to contracts may agree upon any rate of interest not exceeding seven per cent per annum; and that if any greater rate shall be reserved the whole of the interest shall be forfeited and only the principal sum shall be recovered.

“The defense of usury shall not be allowed in any suit, unless the person relying upon such defense shall set up the same by plea, or file in the cause a notice in writing stating that he intends to defend against the contract sued upon or set off, on the ground that the contract is usurious.”¹

The defense of usury is regarded as in the nature of a penal action, and not only is great strictness required in the pleadings, but the contract must be proved as alleged, by a clear preponderance of the evidence.² It is not sufficient to plead, in general terms, that a transaction was usurious; the fact constituting the usury must be set forth.³ Usury is not to be presumed in any case. It must be made to appear from the evidence in the case. If it appears on the face of the instrument sued on, no other proof would seem necessary, provided usury has been set up and is relied on by way of plea, or a notice filed with the general issue.⁴ The plea should only profess to answer so much of the declaration or count as it really does answer.⁵

Under a statute which provided a penalty of three-fold the amount of the interest, and that the defendant should recover costs, it was held that this defense was in the nature of a penal action, and great strictness would be required in pleading it, and that the plea should state specifically the amount forborne, the time of forbearance, and how much was paid, or agreed to

¹ Rev. Stat. (1893), 878; Rev. Stat. (1895), 928; 1 Starr & Curtis 1367; see forms of plea; *Wilday v. Morrison*, 66 Ill. 532.

² *Mosier v. Norton*, 83 Ill. 519.

³ *Mosier v. Norton*, 83 Ill. 519; *Hoskins v. Cole*, 34 Ill. App. 541; *Dunham v. Tucker*, 40 Ill. 520; *Frank*

v. Morris, 57 Ill. 138; *Goodwin v. Bishop*, 50 Ill. App. 145.

⁴ *Wilson v. Kirby*, 88 Ill. 566; *Murray v. Crocker*, 1 Scam. 212; *Smith v. Whitaker*, 23 Ill. 367; *Partlow v. Williams*, 19 Ill. 132; *Frank v. Morris*, 57 Ill. 138; *Bank v. Barton*, 21 Ill. App. 403.

⁵ *Nichols v. Stewart*, 21 Ill. 106.

be paid, by way of interest.¹ To constitute usury, there must be a borrowing and lending of money, or the forbearance of a pre-existing debt.² Discount, or the taking of the legal rate of interest in advance, is not usury.³ Under laws declaring usurious contracts void, the lender is never allowed to take advantage of the statute, because he is the guilty party; but the borrower may do so, because he is not a *particeps criminis*. This principle is applied to every contract declared to be void by statute, in the making of which but one of the parties is guilty of a violation of the law.⁴

Any contract or assurance for the loan or forbearance of money, or any other thing, upon which a greater rate of interest than the law permits has been directly or indirectly reserved, discounted, or taken, is usurious.⁵ The statute against usury can not be evaded by a substitution of securities.⁶

The defense of usury can not be set up against a note in the hands of an assignee in good faith, who received the note before its maturity, and without notice of the usury.⁷ But if a note tainted with usury is assigned by the payee to a creditor, as collateral security for a pre-existing debt, though the latter is a holder for a valuable consideration, he is so only to the extent of the debt due to him; and the same defense may be made to the residue of the note as if it had not been assigned.⁸

Where a note provides that if it is not paid when due a greater rate of interest than is allowed by law shall be paid

¹ *Hancock v. Hodgson*, 3 Scam. 329.

² *Ibid.*

³ *McGill v. Ware*, 4 Scam. 21; *Goodrich v. Reynolds*, 31 Ill. 490; see *Hamill v. Mason*, 51 Ill. 488; *Mitchell v. Lyman*, 77 Ill. 525; *Colehour v. Sav. Inst.*, 90 Ill. 152; *Brown v. S. A. M. Co.*, 110 Ill. 235; *Hoyt v. Pawtucket*, 110 Ill. 390; *Telford v. Garrels*, 132 Ill. 550; *Maxwell v. Willett*, 49 Ill. App. 564; *Polen v. Palmer*, 53 Ill. App. 223; *Hoskins v. Cole*, 34 Ill. App. 541.

⁴ *Ferguson v. Sutphen*, 3 Gilm. 547; *Darst v. Bates*, 95 Ill. 493.

⁵ *Delano v. Rood*, 1 Gilm. 690; *Leonard v. Patton*, 106 Ill. 99; *Bank v. Davis*, 108 Ill. 633; see *Harris v. Bressler*, 119 Ill. 467; *Bressler v. Harris*, 19 Bradw. 430.

⁶ *Hunter v. Hatch*, 45 Ill. 178; *Loveland v. Ritter*, 50 Ill. 54; *Saylor v. Daniels*, 37 Ill. 331; *Harris v. Bressler*, 119 Ill. 467; *McGuire v. Campbell*, 58 Ill. App. 188.

⁷ *Conkling v. Underhill*, 3 Scam. 388; *Saylor v. Daniels*, 37 Ill. 331; *Hemenway v. Cropsey*, 37 Ill. 357; *Woodworth v. Huntoon*, 40 Ill. 131.

⁸ *Saylor v. Daniels*, 37 Ill. 331; see *Kleman v. Frisbie*, 63 Ill. 482.

from that time, the contract will not be considered usurious.¹ If, however, a note should be given, due at its date, or in a short time, so as to induce the belief that it was only designed to evade the statute, it would be deemed usurious.²

A provision in a promissory note for the payment of the highest legal rate of interest from its date, annually, and if not so paid, the annual interest should become principal and bear the same rate of interest as the original principal, does not render the note usurious, and the principal is recoverable with the interest named. But the law will not allow the recovery of compound interest.

There are but two exceptions to this latter rule: first, in relation to interest-bearing coupons attached to bonds, or other securities, for the payment of money. Such coupons, when payable to bearer, have, by commercial usage, the legal effect of promissory notes. The interest on such bonds is not compounded indefinitely, but once only. The second exception is in cases where, the interest having become due and remaining unpaid, the debtor then agrees to have the accrued interest added to the principal and become interest-bearing.³

An agreement in a note that in the event that it is not paid at maturity, and shall be placed in the hands of an attorney for collection, the maker will pay a specified sum as attorney's fee, is not usurious.⁴

A note made payable one day after date, and if not paid when due to draw twenty per cent interest, is usurious, if it was the understanding of the parties that it should not be paid when due, but should draw the rate of interest specified.⁵ If there is no design to evade the statute against usury, interest at a rate greater than the legal one may be agreed to be paid

¹ *Funk v. Buck*, 91 Ill. 575; *Colony v. Edgerton*, 26 Ill. 54; *Gould v. Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Ill. 416; *Sanner v. Smith*, 89 Ill. 123; *Downey v. Beach*, 78 Ill. 53.

² *Gould v. Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Ill. 416; *Pike v. Crist*, 62 Ill. 461; *Wilday v. Morrison*, 66 Ill. 532; *Withrow v. Briggs*, 67 Ill. 96.

³ *Bowman v. Neely*, 137 Ill. 443; same case, 151 Ill. 37; *Telford v. Garrels*, 132 Ill. 550.

⁴ *Barton v. Bank*, 122 Ill. 352; *Ricker v. Scofield*, 28 Ill. App. 32.

⁵ *Osborn v. McCowen*, 25 Ill. 218; *Gould v. Colony*, 35 Ill. 324; see *Walker v. Abt*, 83 Ill. 226; *Eurke v. Raab*, 4 Bradw. 338.

for delay in the payment of money after it becomes due, though no certain time of forbearance is agreed upon.¹

It is not presumed that the purchaser of a note from the payee, a bill-broker, knew that the transaction in which the note was given was usurious, merely because such broker had before sold other notes to the same purchaser at usurious rates. A payee of a note may sell it at such rate as he may choose.²

In equity, a creditor defendant, against whom his debtor obtains relief on the ground of usury in the contract, forfeits only so much interest as is in excess of the amount allowed by law—upon the principle that he who seeks equity must do equity;³ but a creditor complainant, where the transaction is shown to have been usurious, forfeits all interest.⁴

In Illinois, since the passage of the act of 1857, usury voluntarily paid can not be recovered,⁵ or even when paid by means of a sale of property under a power of sale contained in a mortgage;⁶ nor can it be made available under a plea of set-off.⁷ It would seem, however, to be otherwise, at least in equity, where the payment was compulsory, and under circumstances where the debtor could not make the defense.⁸

But although money voluntarily paid as usury can not be recovered, still, so long as any part of the debt remains unpaid, the debtor may insist on a deduction of the usury therefrom. The usury received is considered as having been extorted by means of the debt, and is to be applied in part payment of the same.⁹ A debtor on settlement, may, if he

¹ *Colony v. Edgerton*, 26 Ill. 54; *Peavler v. McLaughlin*, 20 Bradw. 536; *Bressler v. Harris*, 19 Bradw. 430.

² *Sherman v. Blackman*, 24 Ill. 345; *Colehour v. Sav. Inst.*, 90 Ill. 152.

³ *Farwell v. Meyer*, 35 Ill. 40; *Stephen v. Cushman*, 35 Ill. 186; *Cushman v. Stephen*, 42 Ill. 256; *Kinsey v. Nisley*, 23 Ill. 505; *Tooke v. Newman*, 75 Ill. 217.

⁴ *Snyder v. Griswold*, 37 Ill. 216; but see *Mapps v. Sharp*, 32 Ill. 13.

⁵ *Hadden v. Innes*, 24 Ill. 381;

Tompkins v. Hill, 28 Ill. 519; *Manny v. Stockton*, 34 Ill. 306; *Ramsey v. Perley*, 34 Ill. 504; *Saylor v. Daniels*, 37 Ill. 331; *Town v. Wood*, 37 Ill. 512; *Carter v. Moses*, 39 Ill. 539; *Pitts v. Cable*, 44 Ill. 103; *Pedicorn v. Connard*, 85 Ill. 102; *Scroggin v. Brown*, 14 Bradw. 340.

⁶ *Perkins v. Conant*, 29 Ill. 184.

⁷ *Hadden v. Innes*, 24 Ill. 381.

⁸ *Woodworth v. Huntoon*, 40 Ill. 131; see *Mason v. Pierce*, 142 Ill. 331.

⁹ *Farwell v. Meyer*, 35 Ill. 40; *Booker v. Anderson*, 35 Ill. 66; *Say-*

chooses, allow interest on annual interest due and unpaid, and this will not render the transaction illegal.¹

Where A. and others give their note to B., to satisfy a debt from him to C., and the note is usurious, the makers of the note may avail themselves of the defense of usury.² Privies as well as parties to a usurious transaction have a right to take advantage of the statute against usury.³ But one creditor can not raise against another the question of usury in behalf of the debtor.⁴

By the statute of Illinois, interest may be recovered on a sum agreed upon as due, from the time of the agreement.⁵ To interpose the defense of usury to a note made in another state, the defendant should plead the statute of that state, if there be one, which the note violated,⁶ as usury is illegal only as it is made so by statute.⁷

A contract reserving interest at any rate which is authorized by the law of the country where such contract is made, or where it is to be performed or paid, will be recognized and enforced in a court of another country, though by the law of the latter such rate of interest may be usurious.⁸ Where a note is made payable at a particular place, it will be presumed that the parties intended to adopt the law of that place in respect to the rate of interest.⁹

lor v. Daniels, 37 Ill. 331; *Parmalee v. Laurence*, 44 Ill. 405; *Reinback v. Crabtree*, 77 Ill. 182; *Mitchell v. Lyman*, 77 Ill. 525; *House v. Davis*, 60 Ill. 367; *Pike v. Crist*, 62 Ill. 461; *Riddle v. Rosenfield*, 103 Ill. 600; *Harris v. Bressler*, 119 Ill. 467; *Bressler v. Harris*, 19 Bradw. 430; *Mason v. Pierce*, 142 Ill. 331.

¹ *Haworth v. Huling*, 87 Ill. 23; *Jenkins v. Greenbaum*, 95 Ill. 11; *Jenkins v. Bank*, 97 Ill. 568; *McGovern v. Ins. Co.*, 109 Ill. 151; *Telford v. Garrels*, 132 Ill. 550.

² *Nickerson v. Babcock*, 23 Ill. 561.

³ *Safford v. Vail*, 22 Ill. 327; *Henderson v. Bellew*, 45 Ill. 322; *Valentine v. Fish*, 45 Ill. 462.

⁴ *Adams v. Robertson*, 37 Ill. 45;

Stiger v. Bent, 111 Ill. 328; *Darst v. Bates*, 95 Ill. 493; *Mason v. Pierce*, 142 Ill. 331; *Bank v. Bank*, 123 Ill. 510.

⁵ *Colony v. Edgerton*, 26 Ill. 54; 1 Starr & Curtis 1356; *Clark v. Dutton*, 69 Ill. 521; *Ditch v. Vollhardt*, 82 Ill. 134.

⁶ *Giddings v. McCumber*, 51 Ill. App. 373; *Barnes v. Whittaker*, 22 Ill. 606; *Chrisman v. Garr*, 14 Bradw. 405.

⁷ Tyler on Usury 65.

⁸ *McAllister v. Smith*, 17 Ill. 328; see *Adams v. Robertson*, 37 Ill. 45; *Griffin v. Marine Co.*, 52 Ill. 130; *Palmer v. Marshall*, 60 Ill. 289; *Harris v. Bressler*, 119 Ill. 467.

⁹ *Ibid.*

A court of law may open a judgment rendered on a *cognovit*, and let the defendant in to plead to the merits, where usury is alleged to constitute a part of the amount recovered—the judgment continuing in force, for the security of the plaintiff, till the determination of the issue, when it may be reduced, or set aside, if the verdict shall so require.¹

The statute of Anne made contracts reserving usurious interest void, but the Illinois statute of 1833 (and 1845) did not, and the rights of parties under the two statutes were very different.² The statute of Illinois of 1849 attached no penalty to an usurious transaction; it merely modified the contract, so that the defendant should be bound to pay only the principal sum, with legal interest.³

The sixth section of the interest law of 1845 (Illinois) by its terms only gave an action for the recovery of three-fold the amount of the interest paid on an usurious contract, and did not provide a defense against usury contracted for and unpaid.⁴

The fourth section of the act of 1845, above mentioned, provided for a forfeiture of three-fold of the amount of the interest reserved, if interest at a higher rate than six per cent should be received, or agreed to be paid. This act was amended by the act of 1849, which allowed the reserving of interest, in contracts for money loaned, at any rate not exceeding ten per cent per annum. The act of 1857 allows parties to contract for the payment of interest at any rate not exceeding ten per cent per annum, on "money loaned or in any manner due and owing," and provides that all the interest reserved shall be forfeited, in case a higher rate is agreed upon—repealing all other laws providing penalties for the reserving of usurious interest.⁵ Under the present statute, when the defense of usury is established the plaintiff can only recover the principal, less all payments made up to the time of trial. No interest for a period before or after the maturity of the note can be recovered.⁶

¹ *Fleming v. Jencks*, 22 Ill. 475.

² *McGill v. Ware*, 4 Scam. 21.

³ *Nichols v. Stewart*, 21 Ill. 106.

⁴ *Lucas v. Spencer*, 27 Ill. 15.

⁵ *Matthias v. Cook*, 31 Ill. 83;

Hawhe v. Snyderaker, 86 Ill. 197;

Maher v. Lanfrom, 86 Ill. 513.

⁶ *Stein v. Goldsmith*, 44 Ill. App.

108; see *Harris v. Bressler*, 119 Ill.

467.

The act of May 24, 1879,¹ forbids corporations to interpose the defense of usury; and this statute applies to insurance companies as well as to other corporations.² But although the debtor is a corporation and therefore incapable of interposing the defense of usury, a contract by it to pay more than the legal rate of interest is nevertheless unlawful and can not be enforced.³

The contract is governed by the law in force at the time the contract was made.⁴ Loans made according to the provisions of the act for the incorporation of loan associations have been held to be not usurious.⁵ Brokers negotiating loans of the money of others may charge the borrower commissions without thereby making a loan at the full rate of legal interest usurious.⁶ See further, as to the law relating to usury, in Illinois, the additional cases noted below.⁷

No. 103. *Plea of usury.*

(*First plea, non assumpsit, as ante, No. 82.*) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, for any greater sum than *five thousand* dollars (*the sum actually received by the defendant*), because, he says, that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the first count of the said declaration mentioned, and not different causes of action; and

¹ 1 Starr & Curtis 1368; Rev. Stat. (1893), 879; Rev. Stat. (1895), 929.

² *Ins. Co. v. Hadden*, 28 Ill. 260; *Hurd v. Marple*, 2 Bradw. 402.

³ *Bank v. Ry. Co.*, 145 Ill. 208.

⁴ *Matthias v. Cook*, 31 Ill. 83.

⁵ *Freeman v. Ass'n*, 114 Ill. 182; *Holmes v. Smith*, 100 Ill. 413; *Ass'n v. Cady*, 55 Ill. App. 469.

⁶ *Ballinger v. Bourland*, 87 Ill. 513; *Phillips v. Roberts*, 90 Ill. 492; *Boylston v. Bain*, 90 Ill. 283; *Hoyt v. Ins. Co.*, 110 Ill. 390; *Cox v. Ins. Co.*, 113 Ill. 382; *Goodwin v. Bishop*, 145 Ill. 421; *Callender v. Roberts*, 17 Ill. App. 539; *Telford v. Garrels*, 132 Ill. 550; *Proof Co. v. Bank*, 145 Ill. 481; *Sanford v. Kane*, 133 Ill. 199.

⁷ *Leonard v. Patton*, 106 Ill. 99; *Bank v. Davis*, 108 Ill. 633; *Thayer v. Mining Co.*, 105 Ill. 540; *Payne v. Newcomb*, 100 Ill. 611; *Kihlholz v. Wolf*, 103 Ill. 362; *Meers v. Stevens*, 106 Ill. 549; *Goodrich v. Rogers*, 101 Ill. 523; *Cox v. Ins. Co.*, 113 Ill. 382; *Cooper v. Nock*, 27 Ill. 301; *Ins. Co. v. Hadden*, 28 Ill. 260; *Johnson v. Thompson*, 28 Ill. 352; *Blair v. Chamberlain*, 39 Ill. 521; *Durham v. Tucker*, 40 Ill. 519; *King v. Cushman*, 41 Ill. 31; *Parmalee v. Lawrence*, 48 Ill. 331; *R. R. Co. v. Miles*, 52 Ill. 174; *Galbraith v. Fullerton*, 53 Ill. 126; *Driscoll v. Tannock*, 76 Ill. 154; *Reinback v. Crabtree*, 77 Ill. 182.

that before the making of the supposed promissory note in that count mentioned, to wit, on, etc., in, etc., it was corruptly and unlawfully agreed between the plaintiff and the defendant that the plaintiff should lend to the defendant the said sum of *five thousand* dollars, and should forbear the same to him for the space of — months from that day, and that the defendant, for the loan and forbearance of the said sum of money as aforesaid, should pay to the plaintiff, at the end of that space of time, the sum of *five hundred* dollars, making, with the said sum of money so to be lent to the defendant as aforesaid, the sum of *five thousand five hundred* dollars in the said note mentioned, and also that the defendant should then pay to the plaintiff interest on the last mentioned sum of money, from the day *first* aforesaid, at the rate of *ten* per centum per annum, and that to secure the payment as aforesaid of the last mentioned sum of money and the said interest, the defendant should make and deliver his promissory note therefor to the plaintiff; and the defendant further says, that thereupon, on the day *first* aforesaid, in pursuance of the said corrupt and unlawful agreement the plaintiff there lent to the defendant the said sum of *five thousand* dollars; and that to secure the payment thereof and of the said sum of *five hundred* dollars as aforesaid, with interest on both those sums of money as aforesaid, he, the defendant, in further pursuance of the said corrupt and unlawful agreement, then and there made and delivered to the plaintiff the said promissory note in the first said count mentioned, and the plaintiff then and there received the said note of the defendant, in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid. And the defendant avers that the said sum of *five hundred* dollars, and the interest aforesaid of the said sum of *five thousand five hundred* dollars, exceed the rate of eight dollars for the forbearing of one hundred dollars for one year, contrary to the form of the statute, etc. By means whereof, and by force of the said statute, the said note, so far as the amount thereof exceeds the said sum of *five thousand* dollars, was and is wholly void in law. And this, etc. (*conclude with a verification as in No. 85, ante*).

The averments of the plea will, of course, vary according to the circumstances of the case. The replication may be as follows:

No. 104. Replication to No. 103, that note was given on a legal contract.

(*As in No. 86, ante, to the asterisk, and then proceed*;) that the said promissory note was made for a good and legal consideration, and not in pursuance of the corrupt and unlawful agreement, or for the purpose, in the said *second* plea mentioned, in manner and form as the defendant has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

PLEA OF SET-OFF.

If the defendant desires to set off any counter claim not included in the subject-matter of the action, as set up in the dec-

laration, he must plead it specially or give notice in writing under the general issue.¹ A set-off or counter claim can be pleaded only when there is an indebtedness from the plaintiff to the defendant which might be made the subject of an independent suit, and the filing of a plea of set-off is tantamount to the institution of a cross-action by the defendant against the plaintiff in the same proceeding.² The defendant assumes the attitude of the plaintiff and is bound to prove the same facts in relation to his demand as if he had instituted an action upon it.³

The plea must describe the debt intended to be set off, with the same certainty as a declaration for the like demand.⁴ A plea of set-off so much resembles a declaration, that two parts of such a plea are considered as two counts in a declaration, and if one part is good, a general demurrer to the whole is bad.⁵

This defense exists only by virtue of the statute, as at common law a defendant could not set off his demand against that of the plaintiff.⁶ The statute is permissive, and not compulsory, and the defendant may waive his right, and bring an action against the plaintiff.⁷

Under this plea the defendant can only introduce by way of set-off such demands as were existing causes of action in his favor at the time the suit was instituted. He is not permitted, after he has notice of the suit, to buy up claims against the plaintiff, and, by producing them on the trial, defeat the plaintiff's action, and subject him to costs.⁸

¹ Chitty's Pl. 595; *Cox v. Jordan*, 86 Ill. 560; *Waterman v. Clark*, 76 Ill. 428; *Hubbard v. Rogers*, 64 Ill. 434; *Stow v. Yarwood*, 14 Ill. 427; *Jockisek v. Hardke*, 50 Ill. App. 202; *Theodorson v. Ahlgren*, 37 Ill. App. 140.

² *Litch v. Clinch*, 136 Ill. 410.

³ *Kelly v. Garrett*, 1 Gilm. 649; *Ellis v. Cothran*, 117 Ill. 458; *Harber v. Cycle Co.*, 151 Ill. 84.

⁴ Chit. Pl. 495; *R. R. Co. v. Dodge*, 72 Ill. 253; *Breen v. Sullivan*, 5 Bradw. 449; *Cox v. Jordan*, 86 Ill.

560; *Pettis v. Westlake*, 3 Scam. 535; *Kelly v. Garrett*, 1 Gilm. 649.

⁵ 1 Chit. Pl. 496.

⁶ Babb on Set-off, 1; *Morton v. Bailey*, 1 Scam. 214; *Borschsenius v. Canutson*, 100 Ill. 82.

⁷ *Morton v. Bailey*, 1 Scam. 213; *Tompkins v. Gerry*, 43 Ill. App. 255; *Litch v. Clinch*, 136 Ill. 410; *Farrow v. Flatt*, 61 Ill. App. 118.

⁸ *Pettis v. Westlake*, 3 Scam. 538; 2 Steph. N. P. 538; *Ayre's v. McConnell*, 15 Ill. 230; *Ryan v. Burger*, 16 Ill. 28; *Mack v. Woodruff*, 87 Ill. 570;

Unliquidated damages, arising *ex contractu*, may be set off in an action of assumpsit.¹ This, however, can not be done where the claim for unliquidated damages is totally unconnected with the plaintiff's cause of action.²

A separate demand can not be set off against a joint demand nor a joint debt against a separate debt.³ Only such demands can be set off as are mutual between the parties to the suit, or the parties in interest,⁴ and in their own right.⁵ In a suit against a party and his sureties, a debt or demand due from the plaintiff to the principal defendant, may be set off.⁶

Where the maker of a note seeks to set up as a defense, in a suit by an indorsee after maturity, a cross-demand which the maker had against the payee and indorser before the assignment, such demand, or so much thereof as may be necessary, should be pleaded specially, under the statute, and not as a set-off.⁷

The words "claims or demands," as used in the 17th section of the Illinois Practice Act of 1827, embraced all claims or demands arising out of contracts, whether express or implied.⁸ Section 29 of the act now in force is substantially the same.⁹

Ellis v. Cothran, 117 Ill. 458; *Dryer Co. v. Livermore*, 60 Ill. App. 390; *Sprigg v. Granneman*, 36 Ill. App. 102.

¹ *Bridge Co. v. Shannon*, 1 Gilm. 15; *Edwards v. Todd*, 1 Scam. 462; *Nichols v. Ruckells*, 3 Scam. 298; *East v. Crow*, 70 Ill. 91; *Underwood v. Wolf*, 131 Ill. 425.

² *Sergeant v. Kellogg*, 5 Gilm. 273; *Hawks v. Lands*, 3 Gilm. 227; *Hartshorn v. Kinsman*, 16 Bradw. 555; *Clause v. Press Co.*, 118 Ill. 612; *Dock Co. v. Dunlap*, 32 Ill. 207; *De Forrest v. Oder*, 42 Ill. 500; *Robinson v. Hibbs*, 48 Ill. 408; *Dev. Co. v. Clapp*, 50 Ill. App. 301.

³ *Chit. Pl.* 571; *Ryan v. Barger*, 16 Ill. 28; *Burgwin v. Babcock*, 11 Ill. 28; *Hilliard v. Walker*, 11 Ill. 644.

⁴ *Burgwin v. Babcock*, 11 Ill. 28;

Hilliard v. Walker, 11 Ill. 644; *Ryan v. Barger*, 16 Ill. 28; *R. R. Co. v. Neill*, 16 Ill. 239; *Walker v. Cho- vin*, 16 Ill. 489; *Hinckley v. West*, 4 Gilm. 136; *Sergeant v. Kellogg*, 5 Gilm. 273; *Gregg v. James*, Breese, 143; *Lemon v. Stevenson*, 36 Ill. 49; *Lemon v. Baldwin*, 36 Ill. 53; *Coats v. Preston*, 105 Ill. 470; *Scammon v. Kimball*, 92 U. S. 362.

⁵ *R. R. Co. v. Neill*, 16 Ill. 269; *Ayres v. McConnel*, 15 Ill. 230; see *McCord v. Crocker*, 83 Ill. 556.

⁶ *Himrod v. Baugh*, 85 Ill. 435; see *Waterman on Set-offs*, Sec. 237; *Graff v. Kahn*, 18 Bradw. 485; *Hayes v. Cooper*, 14 Bradw. 490.

⁷ *Favorite v. Lord*, 35 Ill. 142.

⁸ *Nichols v. Ruckells*, 3 Scam. 299; *Edwards v. Todd*, 1 Scam. 462.

⁹ *Starr & Curtis* 1791; *Rev. Stat.* (1893), 1075; *Rev. Stat.* (1895), 1159.

Mutual demands arising out of the same subject-matter, and capable of being balanced against each other, may be adjusted in one action, by *recoupment*. It is not necessary that the opposing claims should be of the same character. A claim originating in contract may be set up against one founded in tort, if the counter claims arise out of the same subject-matter, and are capable of adjustment in one action. The defendant in such case can not, however, as in the case of a set-off, recover any excess in his favor. His claim is used in mitigation of damages only.¹

The material difference between set-off and payment as a defense is, that it is optional with the defendant to plead his set-off in defense or make it the subject of an independent suit, while, ordinarily, at least, the defense of payment must be presented and litigated in the suit brought to recover the indebtedness alleged to have been paid, or it will be barred and lost.²

It has been held in Indiana that where, in a suit upon a promissory note in which one of the defendants is principal and the other surety, the defendants plead as a set-off a debt of the plaintiff to the principal, the plaintiff may, in order to meet the plea, set up in reply any debt from the principal to the plaintiff, or to any former holder of the note, which is a legitimate subject of set-off; and the excess only of the defendant's claim shall go in bar of the action.³

An amount not due, claimed as a set-off to a former suit, and not allowed, may, after it becomes due, be recovered.⁴ A court has discretion to allow items of set-off that have been withdrawn to be again filed.⁵ A judgment recovered after action brought, and after plea pleaded, can not be set off against the plaintiff's demand.⁶ A defendant can set off a judgment obtained by a third party against the plaintiff and assigned to the defendant before suit brought.⁷

¹ *Stow v. Yarwood*, 14 Ill. 424;
Tully v. Iron Works, 115 Ill. 544;
Clause v. Printing Co., 20 Bradw.
 113.

² *Litch v. Clinch*, 136 Ill. 410.

³ *Turner v. Simpson*, 12 Ind. 413.

⁴ *Crabtree v. Welles*, 19 Ill. 55;
Cary v. Baneroft, 14 Pick. 315.

⁵ *R. R. Co. v. Keep*, 22 Ill. 9.

⁶ *Irvin v. Wright*, 1 Scam. 135.

Waterman on Set-off, 93, 365;
Ford v. Stewart, 19 John. 343;
Wright v. Cobleigh, 3 Foster 32;
Wilson v. Reeves, 4 Sneed. 173;
Young v. Young, 32 Ill. App. 109.

A defendant is not bound to set off his debt against the plaintiff's demand, except in suits before a justice of the peace.¹ The personal debt of an executor or administrator can not be set off against a debt due to the estate.² In an action to recover a debt accruing to an administrator after the death of the intestate, the defendant can not set off a debt which was owing to him from the intestate in his lifetime.³

An administrator is not bound to set off any debt or demand against a claim presented by a creditor against the estate, and his omission to do so will not bar an action against such creditor.⁴ A note payable in mason-work is not assignable so as to enable the assignee to plead it as a set-off to an action against him, or to enable him to institute a suit thereon in his own name.⁵

Where the plaintiff brought an action of assumpsit against the defendants to recover for the transportation of goods from Buffalo to Chicago, it was held that the defendants might give in evidence under the general issue, and a notice, either by way of set-off or in reduction of damages, that a part of the goods had been lost or destroyed on the voyage by the carelessness or negligence of the plaintiff.⁶ The defendant can not be allowed a set-off, nor can accounts between the parties be adjusted, in an action of trover.⁷

Where bank-notes were introduced by way of set-off, in a suit where the bank was plaintiff, it was held that the defendant must prove that he held them when the suit was commenced.⁸ A banker can not set off a demand he holds against the presenter of a check on such banker.⁹

A claim against a plaintiff in a representative capacity, can not be set off in a suit brought in his individual capacity.¹⁰ It may be shown that the plaintiff in a suit is a trustee of the payee of the note sued on, so as to let in a set-off against the

¹ *Morton v. Bailey*, 1 Scam. 214;
see *Buckner v. Thompson*, 11 Ill.
563.

² *Wisdom v. Becker*, 52 Ill. 342.

³ *Newhall v. Turney*, 14 Ill. 338;
Harding v. Shepard, 107 Ill. 264.

⁴ *Morton v. Bailey*, 1 Scam. 214;
Cook v. Lovell, 11 Iowa 81.

⁵ *Ransom v. Jones*, 1 Scam. 291.

⁶ *Edwards v. Todd*, 1 Scam. 462.

⁷ *Keaggy v. Hite*, 12 Ill. 99.

⁸ *Kelly v. Garrett*, 1 Gilm. 169.

⁹ *Brown v. Leckie*, 43 Ill. 497; *Coats*
v. Preston, 105 Ill. 470.

¹⁰ *Grew v. Burditt*, 9 Pick. 265.

payee.¹ In a suit on a note assigned after maturity, a set-off against the assignor is allowed.² But the demand of the maker against the payee should in such case be pleaded specially, and not as a set-off.³ In an action by a surviving dormant partner, the defendant may set off a debt due from the partnership.⁴ Courts of equity will sometimes interfere to set off one judgment against another, if a party is unable to enforce his judgment at law.⁵

An order drawn by the mayor of a city on its treasurer, commonly called a city order, is a proper subject of set-off in a suit brought by the city against the holder to recover a penalty for a breach of an ordinance of the city.⁶ A set-off is not allowable in a proceeding by *scire facias* for foreclosure,⁷ or in debt on a judgment.⁸ But as to suits on judgments, etc., in Illinois, see section 18, above referred to, of the Practice Act of 1872.

The defendant may plead a set-off in a proceeding by distress for rent.⁹ Where suit is brought by a party in his own name, for a debt due him, in trust for another, and the nominal plaintiff has no interest in the cause of action, it seems the better rule is to allow the defendant to set off so much of any demand held by him against the beneficial plaintiff, as will satisfy the plaintiff's demand, and thus lessen litigation.¹⁰

Section 17 of the limitation act gives the defendant the right to plead a set-off barred by the statute while held and owned by him, to any action the cause of which was owned by the plaintiff, before such set-off was barred; and the defendant, as to such set-off, may recover judgment against the plaintiff for any balance found to be due him.¹¹

¹ *Henry v. Scott*, 3 Ind. 412.

² *Driggs v. Rockwell*, 11 Wend. 504; *Mead v. Gillett*, 19 Wend. 397.

³ *Favorite v. Lord*, 35 Ill. 142.

⁴ *Beach v. Hayward*, 10 Ohio 455.

⁵ *Buckmaster v. Grundy*, 3 Gilm. 626; *Wade v. Wade*, 12 Ill. 89; see *Phelps v. Reeder*, 39 Ill. 172; *Downs v. Jackson*, 33 Ill. 465; *Raleigh v. Raleigh*, 35 Ill. 512; *Derby v. Gage*, 38 Ill. 27; *Matson v. O'Berne*, 25 Ill. App. 213.

⁶ *Springfield v. Hickox*, 2 Gilm. 241.

⁷ *Woodbury v. Manlove*, 14 Ill. 213; *Shetoe v. Ellis*, 14 Ill. 75.

⁸ *Rae v. Hurlbut*, 17 Ill. 572.

⁹ Rev. Stat. (1893), 922; Rev. Stat. (1895), 977; 2 Starr & Curtis 1502; see *Cox v. Jordan*, 86 Ill. 560; *Crate v. Kohlsaas*, 44 Ill. App. 460.

¹⁰ *Rothschild v. Bruscke*, 131 Ill. 265

¹¹ Rev. Stat. (1893), 941; Rev. Stat. (1895), 1003; 2 Starr & Curtis 1556;

No dismissal after plea of set-off.—Section 30 of the Practice Act provides that when a plea or notice of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court.¹

The additional Illinois cases noted below may be consulted on the subject of set-off.²

See also observations under the form of *notice of set-off under general issue*, No. 84, page 151, *ante*.

No. 105. Plea of set-off.

(*First plea, non assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed:*) that the plaintiff was before and at the time of the commencement of this suit, and still is, indebted to him, the defendant, in the sum of — dollars, for (*here set forth the matter or matters of set-off; demands such as would be recoverable under common counts may be stated as in such counts—see consolidated common counts, ante, No.*

see *Steere v. Brownell*, 124 Ill. 27; *Brown v. Miller*, 38 Ill. App. 262; *Sherman v. Sherman*, 36 Ill. App. 482.

¹ Rev. Stat. (1893), 1075; Rev. Stat. (1895), 1159; 2 Starr & Curtis 1797; see *Savings Inst. v. Brockschmidt*, 72 Ill. 370; *E. St. Louis v. Thomas*, 9 Bradw. 412; *Tel. Co. v. Horasck*, 9 Bradw. 309; *Butler v. Cornell*, 148 Ill. 276.

² *Parkinson v. Trousdale*, 3 Scam. 367; *R. R. Co. v. Neill*, 16 Ill. 269; *Bull v. Griswold*, 19 Ill. 631; *Merritt v. Merritt*, 20 Ill. 65; *Stow v. Yarwood*, 20 Ill. 497; *Crabtree v. Kile*, 21 Ill. 180; *Morton v. McClure*, 22 Ill. 257; *Hinrichsen v. Reinbeck*, 27 Ill. 295; *Allen v. Breusing*, 32 Ill. 505; *Heckenkemper v. Dingwehrs*, 32 Ill. 538; *Willets v. Burgess*, 34 Ill. 494; *Peck v. Bligh*, 37 Ill. 317; *Packwood v. Gridley*, 39 Ill. 388; *Bradley v. King*, 44 Ill. 339; *King v. Bradley*, 44 Ill. 342; *Messmore v. Larson*, 86 Ill. 268; *Raymond v. Kerker*, 81 Ill. 381; *Stinson v. Gould*, 74 Ill. 80; *Zuckerman v. Solomon*, 73 Ill. 130; *Gaddis v. Leeson*, 55 Ill. 522; *Clays*

v. White, 65 Ill. 357; *Freiborth v. Mann*, 70 Ill. 523; *Lockhart v. Wolf*, 82 Ill. 37; *Seavey v. Carrington*, 4 Bradw. 324; *Engs v. Matson*, 11 Bradw. 639; *Ellis v. Bank*, 11 Bradw. 275; *Harris v. Pierce*, 5 Bradw. 622; *Buchanan v. Meisser*, 105 Ill. 635; *Howe v. Hickox*, 106 Ill. 461; *Howe v. Frazer*, 117 Ill. 192; *R. R. Co. v. Ennor*, 116 Ill. 67; *Dodge v. People*, 115 Ill. 496; *M. Co. v. Kelly*, 26 Ill. App. 394; *Wolf v. Beaird*, 123 Ill. 588; *Wieland v. Oberne*, 20 Ill. App. 119; *Bank v. Jones*, 119 Ill. 409; *Bank v. Banking Co.*, 114 Ill. 487; *Wenner v. Penny*, 17 Ill. App. 629; *Aholz v. Gultra*, 114 Ill. 241; *Hayden v. Bank*, 29 Ill. App. 464; *Ass. Co. v. Scammon*, 133 Ill. 632; *Murtaugh v. Colligan*, 28 Ill. App. 437; *Caldwell v. Evans*, 39 Ill. App. 615; *Rothschild v. Brusckki*, 131 Ill. 270; *Jeffers v. Jeffers*, 139 Ill. 368; *Rulf v. Rich*, 149 Ill. 436; *Morgan v. Campbell*, 54 Ill. App. 242; *Harper v. M. C. Co.*, 151 Ill. 84; *Snell v. Ball*, 55 Ill. App. 501; *Leavitt v. Stern*, 159 Ill. 526; *Osgood v. Groseclose*, 159 Ill. 511.

26; demands by virtue of specialties, records and special contracts should be set forth specially:) which said sum (or "sums") of money so due from the plaintiff to the defendant, as aforesaid, exceeds (or "exceed") the damages sustained by the plaintiff by reason of the non-performance by the defendant of the several supposed promises in the said declaration mentioned, and out of which said sum (or "sums") of money the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the said damages. And this, etc. (*conclude with a verification, as in No. 85, ante.*)

No. 106. *Replication of statute of limitations to a plea of set-off.*
(*Venue, and title of cause.*)

And the plaintiff as to the said plea of the defendant, by him — above pleaded, says *precludi non*, because, he says, that the said several supposed debts and causes of set-off in the said plea mentioned, did not, nor did any or either of them, arise or accrue to the defendant at any time within *five* years next before the exhibiting of the bill of the plaintiff in this suit, in manner and form as the defendant has above in his said plea in that behalf alleged. And this the plaintiff is ready to verify; wherefore he prays judgment, etc.

E. F., Att'y for Pl'ff.

By the Illinois Practice Act, the defendant is required to file with his plea or notice of set-off a copy of the instrument or account upon which he intends to rely.¹ It is to be observed that the 18th section of the act above mentioned, provides that "demands upon simple contracts may be set off against demands upon sealed instruments, judgments or decrees."

No. 107. *Replication to No. 105—nil debet.*

(*As in No. 86, ante, to the asterisk, and then proceed:*) that he, the plaintiff, was not nor is indebted to the defendant, in manner and form as the defendant has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

The plaintiff may reply *nil debet* to a plea of set-off on simple contract, but if the set-off is on a specialty, or a judgment or other matter of record, he should reply *non est factum, nul tiel record*, or payment, etc.;² or to a plea setting up both a debt of record and a debt on simple contract, he may reply *nul tiel record* as to the former, and *nil debet* as to the latter, in

¹ Rev. Stat. (1893), 1075; Rev. Stat. (1895), 1159; 2 Starr & Curtis 1797; *Eddie v. Eddie*, 61 Ill. 134.

² 1 Chit. Pl. 502; *Solomons v. Lyon*, 1 East 369.

the same replication;¹ and in other instances the replication may contain several distinct answers to different parts of the plea.² Any matter may be replied which a defendant in an action might plead,³ not excepting a counter demand.⁴

PLEA OF RELEASE.

A release may be given in evidence under *non assumpsit*, or pleaded with it;⁵ but in debt on a specialty it must be pleaded.⁶ Where a release has actually been given, it is sometimes advisable to plead it, in order to narrow the evidence on the trial. The statement of the subject-matter of the release, etc., will of course vary, according to the terms of the instrument. This defense, like various others, may be proved under the general issue, although there is also a special plea in which the ground of defense may not have been correctly set forth.⁷ In an action on the case a release need not be specially pleaded.⁸ If one maker of a note is discharged by the release of the other maker, the former alone can avail of such defense. Such a defense is purely personal.⁹

The general rule is, that a release of one of several joint, or joint and several, promisors or obligors discharges all, even though such release specially provides that it shall not operate to discharge the others.¹⁰ But in the case of *Parmalce v. Lawrence*, reported in vol. 44, Illinois Reports, p. 405, the court, after observing that there are facts in that case which widely distinguish it from two former cases in which the court had adhered to the above rule,¹¹ says that "the weight of the modern authorities is against these cases, and in favor of the more reasonable rule that where the release of one of several obligors shows upon its face, and in connection with the

¹ 1 Chit. Pl. 499, 562; 3 Chit. Pl. 935; *Solomons v. Lyon*, 1 East 369.

² 1 Chit. Pl. 499, 562; 3 Chit. Pl. 1158, 1159; *Solomons v. Lyon*, 1 East 369.

³ 1 Chit. Pl. 502.

⁴ *Reilly v. Rucker*, 16 Ind. 303.

⁵ 1 Chit Pl. 418; 3 Ib. 931 o.

⁶ 1 Chit. Pl. 426.

⁷ 1 Chit. Pl. 419.

⁸ 2 Greenl. Ev., Sec. 231; *Coal Co. v. Peterson*, 45 Ill. App. 507.

⁹ *Thomas v. Mueller*, 106 Ill. 36.

¹⁰ *Benjamin v. McConnell*, 4 Gilm. 536; *Rice v. Webster*, 18 Ill. 331; 5 Bac. Abr. 702 g; see *Mueller v. Dobschuetz*, 89 Ill. 176.

¹¹ *Benjamin v. McConnell*, 4 Gilm. 536; *Rice v. Webster*, 18 Ill. 331.

circumstances that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue;" and the court quotes from Parsons on Contracts, vol. 1, p. 24, that "though the word *release* be used, even under seal, yet if the parties (the instrument being considered as a whole, and in connection with all the circumstances of the case and the relations of the parties) can not reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release; for a general covenant not to sue is not of itself a release of the covenantee, but is so construed by the law to avoid circuity of action; and a covenant not to sue one of many who are jointly indebted does not discharge one who is a joint debtor to the covenantor, nor in any way affect his obligation."¹ This case was in chancery, and the evidence showed a scheme on the part of the obligors to procure a release to one of them, for the purpose of escaping the full payment of the debt.

In the case above mentioned, the court also says that the reason why a release of one of several obligors discharges all is that by such release the right to enforce contribution is cut off, and that if that right is reserved, the release should be construed as a simple covenant not to sue, leaving the liability of the co-obligors unimpaired. "The reason of the rule failing, the rule itself should cease, the more especially when its application would work injustice."

One of several joint payees or obligees may receive payment or satisfaction, and discharge the entire obligation, and the others will be bound by his acts in that regard. This is the general rule. But to give that effect to a release executed by one of several joint obligees, it must be the intention of the parties to the release that it shall so operate, and the transaction must be free from all fraud upon the rights of those of the obligees who do not join in the execution of the release.²

¹ *Moore v. Stanwood*, 98 Ill. 605; *Clark v. Laumann*, 52 Ill. App. 637; *Thomason v. Clark*, 81 Ill. App. 404. *Lindley on Part.* 135.

² *Ins. Co. v. Preble*, 50 Ill. 332;

A release is to be construed according to the particular purpose for which it was made, and a particular recital in such an instrument will restrain its general words.¹ A release under seal may be pleaded in bar of a demand for a larger sum than was paid to obtain the release;² but a release not under seal is no bar in such case.³

When made for a sufficient consideration, a release not under seal is binding.⁴ An agreement to extend the time of payment of a debt, without an agreement not to sue, does not *bar* a suit for the debt commenced before the expiration of the extended time,⁵ but such agreement is pleadable in abatement of the suit.⁶ A covenant not to sue is in equity a release.⁷

In a case where the defendant, a railroad company, relied upon a release under seal it was held that if the plaintiff executed the release under the belief, induced by the representations, words or acts of the defendant's agents, that it merely covered a month's time, or wages, such release would not operate as a bar; and that whether the plaintiff so executed it or not was a question for the jury.⁸

Where one of several persons jointly liable is sued alone, and a recovery is had against him, the others are released;⁹ and such former recovery may be given in evidence under the general issue.¹⁰ But where the contract is several as well as joint, separate actions may be prosecuted upon it against the several parties liable, until satisfaction is obtained.¹¹ The release of,

¹ *Seymour v. Butler*, 8 Clark (Iowa) 304.

² *Kingsley v. Kingsley*, 20 Ill. 203; Com. Dig., Release, E, 2, 3; *Flanningham v. Hogue*, 59 Ill. App. 315.

³ *Curtis v. Martin*, 20 Ill. 557; *Kingsley v. Kingsley*, 20 Ill. 203; *Hayes v. Ins. Co.*, 125 Ill. 636; *Martin v. White*, 40 Ill. App. 281; *Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Murphy v. Halleran*, 50 Ill. App. 594.

⁴ *Benjamin v. McConnell*, 4 Gilm. 536; *R. R. Co. v. Read*, 37 Ill. 484.

⁵ *Pomroy v. Parmlee*, 9 Iowa 140.

⁶ *Archibald v. Argall*, 53 Ill. 307; see 1 Chit. Pl. 393.

⁷ *Jones v. Bank*, 29 Conn. 25; *Blair v. Reed*, 20 Texas 310.

⁸ *R. R. Co. v. Welch*, 52 Ill. 183.

⁹ *Wann v. McNulty*, 2 Gilm. 355; *Thompson v. Emmert*, 15 Ill. 415; *Moore v. Rogers*, 19 Ill. 347; *Mitchell v. Brewster*, 28 Ill. 163; *Ward v. Johnson*, 15 Mass. 148.

¹⁰ *Wann v. McNulty*, 2 Gilm. 355; *Lampton v. Jones*, 5 Monroe 236; *Young v. Bumwell*, 2 Hill 580; *Young v. Black*, 7 Cranch. 565.

¹¹ *Moore v. Rogers*, 19 Ill. 347; 1 Chit. Pl. 33; 1 Greenl. Ev., Sec. 239 a.

or receipt of full satisfaction from one joint wrongdoer discharges all. Release to, or the receipt of money from one who is not in fact liable with another will not discharge such other.¹

The additional Illinois cases noted below may be consulted on the subject of release generally,² and on the particular subject of the release of sureties.³

No. 108. Plea of release.

(As in No. 85, ante, to the asterisk, and then proceed:) that after the making of the several promises in the said declaration mentioned, and before

¹ *Wilson v. Reed*, 3 Johns. 175; *Turner v. Hitchcock*, 20 Iowa 310; *Pogel v. Meilke*, 60 Wis. 248; *Wagner v. Transit Co.*, 41 Ill. App. 408; *Gilpatrick v. Hunter*, 24 Me. 18; *Bronson v. Fitzhugh*, 1 Hill. 185; *Vigeant v. Scully*, 35 Ill. App. 46.

² *Scott v. Bennett*, 3 Gilm. 243; *People v. Compher*, 14 Ill. 447; *Ryan v. Dunlap*, 17 Ill. 40; *Lucas v. Harris*, 20 Ill. 165; *White v. Walker*, 31 Ill. 422; *Iglehart v. Crane*, 42 Ill. 261; *Governor v. Lagow*, 43 Ill. 134; *Bradley v. King*, 44 Ill. 339; *Hubbard v. Jasinski*, 46 Ill. 160; *Simmons v. Johnson*, 47 Ill. 350; *Burch v. Hubbard*, 48 Ill. 164; *Fahs v. Roberts*, 54 Ill. 192; *Zirke v. Joliet*, 79 Ill. 334; *Packet Co. v. Defries*, 94 Ill. 598; *Raymond v. Kerker*, 2 Bradw. 496; *R. R. Co. v. Bartlett*, 120 Ill. 607; *R. R. Co. v. Hurst*, 25 Ill. App. 98; *Fey v. Watch Co.*, 32 Ill. App. 630.

³ *Capps v. Smith*, 3 Scam. 177; *Davis v. People*, 1 Gilm. 409; *Waters v. Simpson*, 2 Gilm. 570; *People v. McHatton*, 2 Gilm. 638; *People v. McHatton*, 2 Gilm. 731; *People v. White*, 11 Ill. 341; *Pearl v. Wellmans*, 11 Ill. 352; *Gardner v. Watson*, 13 Ill. 347; *Taylor v. Beck*, 13 Ill. 376; *People v. Blackford*, 16 Ill. 166; *Green v. Wardwell*, 17 Ill. 278;

Gray v. McLean, 17 Ill. 404; *Barnett v. Smith*, 17 Ill. 565; *Payne v. Webster*, 19 Ill. 103; *Chapman v. McGrew*, 20 Ill. 101; *Boynton v. Robb*, 22 Ill. 525; *Allbee v. People*, 22 Ill. 533; *Cunningham v. Wrenn*, 23 Ill. 64; *Lyle v. Morse*, 24 Ill. 97; *Newlan v. Harrington*, 24 Ill. 206; *Warner v. Campbell*, 26 Ill. 282; *Brown v. Haggerty*, 26 Ill. 469; *People v. Ogden*, 27 Ill. 27; *Seely v. People*, 27 Ill. 173; *People v. Lott*, 27 Ill. 215; *Flynn v. Mudd*, 27 Ill. 323; *Montague v. Mitchell*, 28 Ill. 481; *Drew v. Drury*, 31 Ill. 250; *Kennedy v. Evans*, 31 Ill. 258; *Hinds v. Ingham*, 31 Ill. 400; *Ward v. Stout*, 32 Ill. 399; *Woodford v. Dow*, 34 Ill. 424; *Ramsey v. Perley*, 34 Ill. 504; *Pirkins v. Rudolph*, 36 Ill. 306; *People v. Admire*, 39 Ill. 251; *Governor v. Bowman*, 44 Ill. 499; *Breese v. Schuler*, 48 Ill. 329; *Phares v. Barbour*, 49 Ill. 370; *Galbraith v. Fullerton*, 53 Ill. 126; *Foss v. City*, 34 Ill. 488; *Farwell v. Meyer*, 35 Ill. 40; *Landis v. People*, 39 Ill. 79; *Governor v. Lagow*, 43 Ill. 134; *Rogers v. Trustee*, 46 Ill. 428; *Boynton v. Phelps*, 52 Ill. 210; *Oxley v. Stoner*, 54 Ill. 159; *Moore v. Stanwood*, 98 Ill. 605; *Potter v. Grosenback*, 117 Ill. 407; *Mfg. Co. v. Parmenter*, 41 Ill. App. 639; *Dupee v. Blake*, 148 Ill. 453.

the commencement of this suit, to wit, on, etc., in, etc., the plaintiff, by his deed bearing date of that day, and now to the court here shown, released to the defendant the said several promises, and all demands and causes of action whatsoever which the plaintiff then had against the defendant, or might thereafter have or allege against him, by reason of any matter or thing previous to that time; as by the said deed, reference being thereto had, will fully appear: And this, etc. (*conclude with a verification, as in No. 85, ante*).

In debt on simple contract, say "after the making of the several contracts;" in debt on a specialty, or in covenant, say, "after the making and delivery of the said writing;" and in trespass, say "after the committing of the several trespasses"—in case, etc., "grievances;" and so on, throughout the plea, using words appropriate to the particular form of action.

(In any pleading where it is meant to dispute the validity of the contract or promise set up on the other side, it is proper to refer to such contract or promise by the term "*supposed*," *e. g.*, "the said supposed promise, etc.; or a deed or other instrument may be referred to as "the said writing;" and in like manner alleged trespasses or grievances may be referred to as "the said supposed trespasses," etc.)

For a form of general release, at full length, see the precedent of a plea of release in 3 Chitty's Pleading.

No. 109. Replication to No. 108—non est factum.

(*As in No. 86, ante, to the asterisk, and then proceed:*) that the supposed writing of release in that plea mentioned is not his deed; and this he prays may be inquired of by the country, etc.

The replication may be "that the said supposed writing of release was obtained from the plaintiff by the fraud and covin of the defendant," concluding with a verification; or that the writing was obtained by duress, for which see the precedent of a plea of duress, in the action of DEBT, *post*.

PLEA OF PAYMENT.

Payment may be given in evidence under the general issue in assumpsit, and in debt on simple contract,¹ but in debt on a specialty it must be pleaded.* Under the plea of pay-

¹ 1 Chit. Pl. 417-422; Gould's Pl. 304-306; Greenl. Ev., Sec. 516; *Crews v. Bleakley*, 16 Ill. 21.

* 1 Chit. Pl. 426; Gould's Pl. 303.

ment, the defendant may, by proving payment in full, defeat a recovery altogether; and by showing partial payment he may defeat it *pro tanto*.¹

A payment to a nominal plaintiff is not a satisfaction of the debt.² Where a person makes a payment of money, he is bound to know whether the person to whom the payment is made is authorized to receive it. If he who has paid money could have successfully resisted a suit brought by the person to whom he has paid it, then such payment is not good; and this is the true test of the validity of a payment.³ A receipt in full of all demands is evidence *prima facie* of the payment of all notes and claims existing at the time the receipt is given.⁴

Where a debtor makes a payment without specifying to what debt it shall be applied, the creditor has the right to select the debt on which he will give the credit.⁵ Where notes of third persons are placed in the hands of a creditor as collateral security, but are not paid, the person depositing them can claim no credit for the amount due by such notes.⁶ A payment to one of several partners is a payment to all, unless such payment to the one is strictly forbidden by the others.⁷

The giving of a bond in satisfaction of a judgment is in law

¹ *Hays v. Smith*, 3 Scam. 427; *Keyes v. Fuller*, 9 Bradw. 528.

² *Tuplet v. Scott*, 12 Ill. 137.

³ *Holmes v. Field*, 12 Ill. 424; *People v. Smith*, 43 Ill. 220; *Dutcher v. Beckwith*, 45 Ill. 460; *People v. Deams*, 92 Ill. 192; *Stover v. Mitchell*, 45 Ill. 213; *Towner v. McClelland*, 110 Ill. 542; *Lochenmeyer v. Fogarty*, 112 Ill. 572.

⁴ *Marston v. Wilcox*, 1 Scam. 270; *Lawrence v. Lane*, 4 Gilm. 354; *Holmes v. Field*, 12 Ill. 424; *Haralson v. Bridges*, 14 Ill. 37; *Capps v. Graham*, 14 Ill. 198; *Neal v. Handley*, 116 Ill. 421.

⁵ *McFarland v. Lewis*, 2 Scam. 347; *Bayley v. Wynkoop*, 5 Gilm. 449; *Arnold v. Johnson*, 1 Scam.

196; *Dehner v. Rolling Mill*, 7 Bradw. 47; *Craig v. Miller*, 103 Ill. 605; *Hintz v. Cahn*, 29 Ill. 308; *Lowery v. Gear*, 32 Ill. 382; see 2 Greenl. Ev., Sec. 530, 533; *Jackson v. Bailey*, 12 Ill. 159; *Spoull v. Samuel*, 4 Scam. 136; *Starr v. Richmond*, 30 Ill. 276; *Miller v. Montgomery*, 31 Ill. 350; *Express Co. v. Lesem*, 39 Ill. 313; *Sprague v. Hazenwinkle*, 53 Ill. 419; *Hare v. Stegall*, 60 Ill. 380.

⁶ *Prettyman v. Barnard*, 37 Ill. 106; see *Wilhelm v. Schmidt*, 84 Ill. 183.

⁷ *Gregg v. James, Breese* 143; see *Granger v. McGilvra*, 24 Ill. 154; *Kipp v. McChesney*, 66 Ill. 460; *Lyman v. Gedney*, 114 Ill. 388.

a payment of such judgment.¹ A payment in good faith to an agent of the creditor, authorized to receive it, is a payment to the creditor, even though the agent misapplies the amount received.²

A payment may be in goods as well as in money.³ The giving of a new note is a payment of a former one,⁴ if it be so understood and agreed by the parties,⁵ but in the absence of anything showing a contrary intention the presumption of law will be that the new note is not a payment of the old one.⁶

The giving of a note for a debt does not pay or discharge the debt, unless it be agreed that it shall be accepted as payment and satisfaction.⁷ The giving of a note for an open account is *prima facie* a payment of the account,⁸ but the note when due may be surrendered and an action maintained on the original cause of action.⁹

An attempted payment by a draft or check which is dishonored is no payment.¹⁰ Under the plea of payment, evidence of set-off, or of matter in recoupment, is admissible.¹¹

No. 110. Plea of payment.

(First plea, non assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed:) that after the making of the several

¹ *Cox v. Reed*, 27 Ill. 433; *Ralston v. Wood*, 15 Ill. 159; see *Woodburn v. Woodburn*, 115 Ill. 427.

² *Executors v. Brabham*, 3 Ohio 275; *Melvin v. Ins. Co.*, 80 Ill. 446.

³ *Cannon v. Wood*, 2 M. & W. 465; *Kyle v. Green*, 14 Ohio 497; see *Ryan v. Dunlap*, 17 Ill. 40; *Stevens v. Bradley*, 22 Ill. 244.

⁴ *Smalley v. Edey*, 19 Ill. 207; *Dedman v. Williams*, 1 Scam. 154; *Granger v. McGilvra*, 24 Ill. 154; *Miller v. Lumsden*, 16 Ill. 161; *Hodgen v. Latham*, 33 Ill. 344; *Kappes v. Lumber Co.*, 1 Bradw. 280; *Gage v. Lewis*, 68 Ill. 604; see *Wheelock v. Berkeley*, 138 Ill. 153.

⁵ *Yates v. Valentine*, 71 Ill. 644; *Thompson v. Briggs*, 28 N. H. 40; *Hill v. Morey*, 49 N. H. 268; *Jansen v. Grimshaw*, 125 Ill. 476; *S. & G. Co.*

v. Iron Wks., 124 Ill. 623; *Fairbanks v. Bank*, 132 Ill. 120.

⁶ *Sav. Bank v. Bornman*, 124 Ill. 200; *S. & G. Co. v. Iron Works*, 124 Ill. 623; *Adams v. Squires*, 61 Ill. App. 513; *Chisholm v. Williams*, 128 Ill. 115.

⁷ *Walsh v. Lennon*, 98 Ill. 31; *Gage v. Lewis*, 68 Ill. 604; *Ralston v. Wood*, 15 Ill. 171; *Smalley v. Edey*, 19 Ill. 207; *Hitt v. Sharer*, 34 Ill. 9; *Paddock v. Stout*, 121 Ill. 571; *Mfg. Co. v. Cheese Co.*, 59 Ill. App. 573.

⁸ *Morrison v. Smith*, 81 Ill. 221; *Hoodless v. Reid*, 112 Ill. 105.

⁹ *Ibid.*

¹⁰ *Mattheus v. Cowan*, 59 Ill. 341; *Bank v. McCrea*, 106 Ill. 281.

¹¹ *Hill v. Austin*, 19 Ark. 230; see *Allen v. Breusing*, 32 Ill. 505; *Heckenkemper v. Dingwehrs*, 32 Ill. 538.

promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc., in, etc., (*) he paid to the plaintiff, and the plaintiff accepted from him, the defendant, divers moneys, amounting to a large sum, to wit, the amount of all the sums of money in the said declaration mentioned, in full satisfaction and discharge of the said several promises and of the sums of money last aforesaid: And this, etc. (*conclude with a verification, as in No. 85, ante*).

In order to adapt this plea to an action of debt on simple contract, it will be sufficient to substitute the word *contracts* for the word *promises*, throughout the plea; or other forms of words, appropriate to that action, may be used. If it is desired to plead a partial payment only, the plea is to be limited accordingly in the commencement; and if a payment after action brought is to be pleaded, the defendant says in the commencement that the plaintiff “ought not *further* to maintain his aforesaid action,” etc.¹

The above form, substantially, of the plea of payment is believed to be the one generally used, but it seems rather to be a plea of accord and satisfaction than of payment. No precedent of a plea of payment in *assumpsit*, or in debt on simple contract, is found in Chitty on Pleading, probably for the reason that it was not usual in England to plead this defense specially in those actions. It is submitted that a plea would be sufficient in which the defendant should allege that “he paid to the plaintiff all the moneys in the said declaration alleged to be due to him from the defendant”—substituting these words for those between the asterisk and the conclusion in the above precedent.

No. 111. Replication to No. 110, denying the payment.

(*As in No. 86, ante, to the asterisk, and then proceed*;) that the defendant did not pay to the plaintiff the moneys in the said *second* plea in that behalf mentioned, in full satisfaction and discharge of the several promises and sums of money in the said declaration mentioned, in manner and form as the defendant has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

(If the plea should be that the defendant “paid to the plaintiff all the moneys in the said declaration alleged to be due to him

¹ See forms, 2 Swan's Pr. 702-706.

from the defendant," then the replication would be simply "that the defendant did not pay to the plaintiff the moneys in the said second plea in that behalf mentioned, or any part thereof, in manner and form," etc.)

PLEA OF ACCORD AND SATISFACTION.

"Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account."¹ In order to make a good accord it is essential: 1. That it be legal; an agreement to drop a criminal prosecution as a satisfaction for an assault and imprisonment is void.² 2. It must be advantageous to the party accepting; hence, restoring to the plaintiff his property, of which the defendant has wrongfully dispossessed him, will not be any consideration to support a promise by the plaintiff not to sue him for the injury.³ 3. It must be certain; hence, an agreement that the defendant shall relinquish the possession of a house in satisfaction, etc., is not valid, unless it is also agreed at what time it shall be relinquished.⁴ 4. The defendant must be privy to the contract; if, therefore, the consideration for the promise not to sue proceeds from another, the defendant is a stranger to the agreement, and the circumstance that the promise has been made to him will be of no avail.⁵ 5. The accord must be executed.⁶

¹ 3 Blacks. Com. 15; Bacon's Abr., Accord; 2 Greenl. Ev. 28; *Ins. Co. v. Stevens*, 48 Ill. 32.

² *Edgecombe v. Rodd*, 5 East 294; see 2 Wils. 341; Cro. Eliz. 541; 1 Bouvier's L. D. 47; *Smith v. Grable*, 14 Iowa 429; *Walton v. Kerby*, 99 Mass. 1; *Johnson v. Hunt*, 81 Ky. 321.

³ 1 Bouv. L. D. 47; *Fitch v. Sutton*, 5 East 230; *Cumber v. Wane*, 1 Stra. R. 426; *Heathcote v. Crookshank*, 2 T. R. 24; *Steinman v. Magnes*, 11 East. 390; *Logan v. Austin*, 1 Stew. R. 476; *Bliun v. Chester*, 5 Day R. 360; *Le Page v. McCrea*, 1 Wend. 164; *Davis v. Noaks*, 3 J. J. Marsh. 497; *Keeler v. Neal*, 2

Watts (Pa.) 424; *Rusk v. Gray*, 83 Ind. 589.

⁴ Yelv. 125; 4 Mod. 88; *Bird v. Caritat*, 2 Johns. 342; 1 Bouv. L. D. 189.

⁵ Stra. R. 592; *Clow v. Burst*, 6 Johns. R. 37; 3 Mod. 302; *Daniels v. Hallenbeck*, 19 Wend. 408.

⁶ *Watkinson v. Inglesby*, 5 Johns. R. 592; *Kromer v. Heim*, 75 N. Y. 574; *Bragg v. Pierce*, 53 Maine 65; *Cushing v. Wyman*, 44 Me. 121; *Lynn v. Bruce*, 16 Johns. 86; *Russell v. Lytle*, 6 Wend. 390; *Clark v. Dinsmore*, 5 N. H. 136; *Bank v. De Grauw*, 23 Wend. 342; see *Fitch v. Haight*, 4 Scam. 51; *McGehee v. Shafer*, 15 Texas 198.

Accord with satisfaction, when completed, has two effects. It is a payment of the debt, and it is a species of sale of the thing given by the debtor to the creditor in satisfaction; but it differs from a sale in this, that it is not valid until the delivery of the article, and there is no warranty of the thing thus sold, except, perhaps as to the title.¹

A plea of accord and satisfaction must show an acceptance of the property alleged to have been delivered in satisfaction of the demand.² An item of account canvassed and disallowed at a settlement of accounts, upon which settlement a note is given, may afterward be made the foundation of an action or set-off, in the absence of fraudulent representations or practices at the settlement.³ It seems that an attachment of sufficient property is, like an execution levied, a satisfaction of the debt, and may be so pleaded.⁴ When a party relies on accord and satisfaction in bar in an action, he must show that the accord has been fully executed.⁵ A plea of accord without satisfaction is not a good plea to an action of trespass.⁶ The acceptance of a less sum in money than is actually due can not be a satisfaction and will not operate to extinguish the whole debt although agreed to by the creditor.⁷

The reason of this rule is that there must be some consideration for the relinquishment of the excess due beyond the sum paid, otherwise the agreement is *nudum pactum*.⁸ This rule has no application, however, when property other than money is taken in satisfaction⁹ or when there is an honest compromise of unliquidated or disputed demands.¹⁰ An agreement to ac-

¹ 1 Bouv. Law Dict. 47, and cases there cited; *Insurance Co. v. Stevens*, 48 Ill. 32.

² *Drake v. Mitchell*, 3 East 256; *Hearn v. Kiehl*, 38 Penn. St. 147; *Fitch v. Haight*, 4 Scam. 51; *Simmons v. Clark*, 56 Ill. 96; *Bank v. De Grauw*, 23 Wend. 342; *Watkinson v. Inglesby*, 5 Johns. 392.

³ *Bright v. Coffman*, 15 Ind. 371.

⁴ *Yourt v. Hopkins*, 24 Ill. 326; *Winternitz' Appeal*, 40 Penn. St. 490.

⁵ *McGehee v. Shafer*, 15 Tex. 198; *Cushing v. Wyman*, 44 Me. 121; see *Fitch v. Haight*, 4 Scam. 51.

⁶ *Goff v. Mulholland*, 28 Mo. 397.

⁷ *Brooks v. White*, 2 Metc. 285; *Hays v. Ins. Co.*, 125 Ill. 626.

⁸ *Fitch v. Sutton*, 5 East 232; *Bailey v. Day*, 26 Me. 88; *Parsons on Contracts* 618; *Hays v. Ins. Co.*, 125 Ill. 626; *Martin v. White*, 40 Ill. App. 281.

⁹ *Hays v. Ins. Co.*, 125 Ill. 626; *Neal v. Handley*, 116 Ill. 418; but see *Morrill v. Baggott*, 157 Ill. 240.

¹⁰ *Hays v. Ins. Co.*, 125 Ill. 626; *Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Rosenmuller v. Lampe*, 89 Ill. 212.

cept a less sum secured for a larger sum unsecured, or differently secured, is held to be a good accord and satisfaction.¹ An accord and satisfaction with one of several joint *tortfeasors* is a bar to an action against the others.² And a partial satisfaction by one of several wrong-doers is a satisfaction *pro tanto* as to all.³

A money debt may be satisfied by payment in property, if so accepted, whatever its value may be.⁴

No. 112. Plea of accord and satisfaction--Delivery and acceptance of goods.

(As in No. 85, ante, to the asterisk, and then proceed:) that after the making of the several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc., in, etc., he delivered to the plaintiff, and the plaintiff accepted of him, the defendant, *two thousand bushels of wheat*, of the value of — dollars, in full satisfaction and discharge of the said several promises and of all the sums of money in the said declaration mentioned: And this, etc. (conclude with a verification, as in No. 85, ante.)

Some of the precedents of this plea omit the statement as to the value of the property delivered.⁵ It is not required that the chattels delivered should be of value equal to the debt, for, as it is said, "the party receiving them is always taken to be the best judge of that, in matters of uncertain value."⁶ See the observations under forms No. 108 and No. 110, *ante*, as to adopting the plea to the action of debt on simple contract, or other action. The defense of accord and satisfaction may be given in evidence under the general issue in assumpsit, debt on simple contract,⁷ and case,⁸ but in debt on a specialty,⁹ and in trespass, it must be pleaded.¹⁰

¹ *Post v. Bank*, 138 Ill. 559; 1 Am. & Eng. Ency. Law, 101.

² *City v. Babcock*, 143 Ill. 358; *Wagner v. Transit Co.*, 41 Ill. App. 408; *Goss v. Ellison*, 136 Mass. 503.

³ *Bank v. Curtis*, 37 Barb. 317.

⁴ *Blinn v. Chester*, 5 Day 360; *Bull v. Bull*, 43 Conn. 455; *Reid v. Bartlett*, 19 Pick. 273; *Bliss v. Shwarts*, 64 Barb. 215; *Ridlon v. Davis*, 51 Vt. 457; *Neal v. Handley*, 116 Ill. 418.

⁵ *Steph. Pl.* 218; 2 *Swan's Pr.* 604; see 3 *Chit. Pl.* 924.

⁶ *Andrew v. Boughey*, *Dyer* 72 a; *Thompson v. Percival*, 5 B. & Ad. 932; 3 N. & M. 167, S. C.

⁷ 1 *Chit. Pl.* 417, 421, 422; *Gould's Pl.* 304-307.

⁸ 1 *Chit. Pl.* 432; *Gould's Pl.* 308.

⁹ 1 *Chit. Pl.* 426.

¹⁰ 1 *Chit. Pl.* 441; *Kenyon v. Sutherland*, 3 *Gilm.* 99.

No. 113. *Replication to No. 112, denying delivery of property, etc.*

(As in No. 86, ante, to the asterisk, and then proceed:) that the defendant did not deliver to the plaintiff the said *two thousand bushels of wheat* in the said *second* plea mentioned, in full satisfaction and discharge of the several promises and sums of money in the said declaration mentioned, in manner and form as the defendant has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

No. 114. *Plea of accord and satisfaction—Account stated, and delivery of defendant's promissory note in satisfaction.*

(First plea, non assumpsit, as ante, No. 82.) And for a further plea in this behalf, as to the sum of — dollars, (*the sum for which the note was given,*) parcel of the several sums of money in the said declaration mentioned, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, that after the making of the several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc., in, etc., an account was stated between the plaintiff and the defendant, concerning the said several sums of money in the said declaration mentioned, and upon that accounting the defendant was then and there found to be indebted to the plaintiff in the said sum of — dollars; for which said sum of money the defendant then and there made, and delivered to the plaintiff, his promissory note, bearing date of that day, whereby he, the defendant, promised to pay that sum of money to the plaintiff, or his order, — — after the date of the said note; and the plaintiff then and there accepted the said note for and on account of the said sum of — dollars, parcel, etc.; and by reason thereof the defendant then and there became, and still is, liable to pay that sum of money, according to the tenor and effect of the said note. And this, etc. (*conclude with a verification, as in No. 85, ante.*)

In general the payment of a smaller sum can not be pleaded as a satisfaction of a larger. The plea should therefore be pleaded only to the amount of the sum mentioned in the note or bill, as in the above form, or else it should aver that the defendant was not indebted to the plaintiff more than that sum.¹ See a precedent in the latter form, 3 Chit. Pl., 5th Am. Ed. 926.²

Where the defendant, in his plea, alleged that on stating a balance of accounts he delivered certain negotiable paper to one C., on account and in behalf of the plaintiffs, but did not aver that C. was the agent of the plaintiffs, nor that the paper

¹ 3 Chit. Pl., 11th Am. Ed., 926 t.

² See *Thomas v. Heathorn*, 2 B. & Cres. 477.

was accepted in full satisfaction and discharge of the debt due to the plaintiffs, the plea was held bad.¹

In 3 Chitty on Pleading, p. 1157, *note*, it is said that "where a note or bill has in fact been given in payment, and is so pleaded, the replication must not traverse the delivery or acceptance in satisfaction, but must state the dishonor of such bill when the same became due, and if the defendant were drawer or indorser, should aver that he had notice thereof." See the precedent there given.

The replication sometimes *protests* the delivery of the goods, etc., and traverses the acceptance, and this is proper where there has in fact been a delivery, but no acceptance in satisfaction.² The commencement of a replication with a protestation is as follows:

"And the plaintiff, as to the plea of the defendant by him *secondly* above pleaded, says that he, the plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having his aforesaid action, because protesting that the defendant did not deliver to him, the plaintiff, the *horses* in the said *second* plea mentioned, as the defendant has above in that plea alleged; for replication, nevertheless, in this behalf, the plaintiff says," etc.

The only use or effect of a protestation in a pleading is to enable the party making it—in case he succeeds in the point to be tried—to dispute in any *other* action the matter so protested.³

PLEA OF ARBITRAMENT AND AWARD.

Arbitrament and award may be given in evidence under the general issue; but it is frequently advisable to plead it, in order to compel the plaintiff in his replication to take issue on some particular part of the plea, and thereby admit the residue. In debt on a specialty, covenant or trespass it must be pleaded specially.⁴

¹ *Bird v. Caritat*, 2 Johns. 324; see *Kearslake v. Morgan*, 5 Term R. 513.

² 3 Chit. Pl. 1156, *note*.

³ Steph. Pl., 218, *note*; Com. Dig.

Pl. n.; *Haldipp v. Otway*, 2 Saund. 103 a, n.; 1 Chit. Pl. 533.

⁴ Bac. Abr., Arbit., G.; 3 Chit. Pl. 927, *note*; 1 Chit. Pl. 418, 426, 428,

441.

No. 115. Plea of arbitrament and award.

(As in No. 85, ante, to the asterisk, and then proceed :) that after the making of the several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc., in, etc., the plaintiff and the defendant submitted themselves, (*here state the mode of submission, which may have been thus:*) by two mutual bonds of arbitration, bearing date of that day, to the arbitration, and engaged in all things to abide and perform the award and arbitrament of G. H. and L. M., arbitrators indifferently chosen as well on the part of the plaintiff as of the defendant, to arbitrate and award concerning all actions, causes of action, controversies and demands whatsoever theretofore or then had or existing between the said parties, or by either of them against the other, so as the said award should be made by the said arbitrators, under their hands, and ready to be delivered to the said parties in difference, or such of them as should desire the same, on or before, etc., then next: (*If the time for making the award was enlarged, here aver the enlargement, by consent, etc.*) And the defendant further says, that the said arbitrators, before the expiration of the said time limited for making their award, to wit, on, etc., in, etc., took upon themselves the burden of the said arbitration, and having duly examined and considered the subject-matter in dispute between the plaintiff and the defendant, they, the said arbitrators, did make their award in writing under their hands, concerning the premises, and concerning the said promises in the said declaration mentioned, ready to be delivered to the said parties in difference, and did thereby then and there award that, etc., (*here set forth the award*;) as by the said award, bearing date, etc., reference being thereunto had, will more fully appear. And this the defendant is ready to verify; wherefore he prays judgment, etc.

The above form can be varied to correspond with the arbitration-bond—or the submission, written or verbal—the facts in relation to the submission and award, and the form of action.¹

No. 116. Replication to plea of arbitrament denying the award.

(*Venue, and title of cause.*)

And the plaintiff as to the said plea of the defendant by him — above pleaded, says that the plaintiff, by reason of anything by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the defendant (*or precludi non*), because he says, that the said arbitrators did not make any such award of and concerning the premises, in manner and form as the defendant has above in his plea in that behalf alleged. And this the plaintiff prays may be inquired of by the country, etc.

E. F., Att'y for Plff.

¹ See precedent, 3 Chit. Pl. 927.

*No. 117. Replication to a plea of award.**(Venue, and title of cause.)*

And the plaintiff as to the said plea of the defendant, by him — above pleaded, says, *precludi non*, because he says that the said causes of action above declared on were not included in the said submission to arbitration, and were not in difference between the parties thereto at the time; and this he is ready to verify, etc., wherefore he prays judgment, etc.

E. F., Att'y for Pl'ff.

*No. 118. Rejoinder to a replication to a plea of award.**(Venue, and title of cause.)*

And the defendant as to the said replication of the plaintiff, to the — plea of the defendant, says *actio non*, because he says that the matters above declared on were included in the said submission to arbitration, and were in difference between the parties thereto at the time; and of this he puts himself upon the country, etc.

G. H., Att'y for Def't.

See chapter entitled ARBITRATION AND AWARD, *post*.

PLEA OF FORMER ADJUDICATION.

Where the subject-matter of a cause of action has been once determined by the final judgment or decree of a court of competent jurisdiction, such judgment or decree will be conclusive between the parties thereto and will be a bar to any other proceeding on the same cause of action.¹ But it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject-matter of the record will be open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and decided in the former proceeding.²

¹ *Jones v. Smith*, 13 Ill. 301; *Abrams v. Lee*, 14 Ill. 167; *Zimmerman v. Zimmerman*, 15 Ill. 84; *Crosby v. Gipps*, 16 Ill. 352; *Vanlandingham v. Ryan*, 17 Ill. 25; *R. R. Co. v. Allen*, 39 Ill. 205; *Kreuchi v. Dehler*, 50 Ill. 176; *Oetgen v. Ross*, 54 Ill. 79; *Hawley v. Simons*, 102 Ill. 115; *Cooper v. Corbin*, 105 Ill. 224; *Noyes v. Kern*, 94 Ill. 524; *Peterson v. Nehf*, 80 Ill. 25; *Miller v.*

Ticker, 14 Bradw. 558; *Brackett v. People*, 115 Ill. 29; *Kilgour v. Dr. Com.*, 111 Ill. 342; *Stickney v. Goudy*, 132 Ill. 213; *Moore v. Williams*, 132 Ill. 589; *Kitson v. Farwell*, 132 Ill. 327; *Shunick v. Thomson*, 25 Ill. App. 619; *City v. Cameron*, 120 Ill. 457; *Webber v. Mackey*, 31 Ill. App. 369; *Riverside v. Townsend*, 120 Ill. 13.

² *Palmer v. Sanger*, 143 Ill. 34.

A former adjudication by a court of competent jurisdiction is not only final as to the matter actually determined, but as to every other matter which the parties were bound to litigate and bring to a decision as an incident to, or essentially connected with, the subject-matter in litigation.¹

The rule, however, can not be invoked where there has been fraud in obtaining such adjudication if the party defrauded is not estopped by want of diligence.² Where some controlling fact or matter material to the determination of two causes of action has been adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again at issue between the same parties, the adjudication of the fact or matter in the first suit, if properly presented, will be conclusive upon the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not.³

Parol evidence may be admitted to show what was adjudicated upon in a former suit, but not what the adjudication was.⁴ A former adjudication is sometimes binding upon persons who are not parties to the record. One in whose behalf or under whose direction a suit is prosecuted or defended, will be barred by the judgment or decree rendered in it, and parol evidence will be admitted to show who is the real party in interest, and that such person conducted the litigation in the name of another person.⁵

A judgment on demurrer for defect in the pleadings, or on a non-suit for want of proof or for a variance, or on a non-suit by agreement after trial on the merits, will not be a bar to another action for the same cause;⁶ and if such a judgment is

¹ *R. R. Co. v. Cheshire*, 59 N. H. 409; *Windett v. Ins. Co.*, 27 Ill. App. 68; *Harmon v. Auditor*, 123 Ill. 133; *Bennett v. Mining Co.*, 119 Ill. 14.

² *Shinkler v. Letcher*, 47 Ill. 216.

³ *Wright v. Griffey*, 147 Ill. 496; *Leopold v. City*, 150 Ill. 568.

⁴ *Zimmerman v. Zimmerman*, 15 Ill. 84; *Shepard v. Butterfield*, 41 Ill. 76; *Leopold v. City*, 150 Ill. 568; *Wright v. Griffey*, 147 Ill. 496.

⁵ *Smith v. Express Co.*, 135 Ill. 279; *Cheney v. Patton*, 134 Ill. 422; *Harding v. Fuller*, 141 Ill. 308.

⁶ *Vanlandingham v. Ryan*, 17 Ill. 25; *Smalley v. Edey*, 19 Ill. 207; *Howes v. Austin*, 35 Ill. 396; *Miller v. McManis*, 57 Ill. 126; *Briscoe v. Power*, 85 Ill. 420; *Davis v. Kennedy*, 105 Ill. 300; *Bentley v. O'Bryan*, 111 Ill. 53; *Brackett v. People*, 115 Ill. 29.

pleaded in bar, the plaintiff may reply that the same was not obtained on the merits.¹ It is not to be understood, however, that a judgment on a demurrer is in no case a bar.²

Where the promise of several is joint, and not several, a judgment against one or more is a bar to another action on the same contract, whether against the same or other parties;³ thus a judgment against one member, for a debt due from the partnership, is a bar to a recovery against the other members.⁴ A judgment in favor of the maker of the note, on its merits, in an action by an assignee, is a bar to a subsequent action brought by the payee against the maker. The payee having, by his indorsement, authorized his assignee to sue upon the note, is bound by the judgment against the assignee, upon the merits.⁵

A plaintiff who recovers in replevin against one person, and obtains a return of the goods, can not afterwards sue the same and another person in trespass for the same taking; and it makes no difference whether the damages awarded in the replevin suit have been paid or not.⁶

It is said that "if the damages recovered were for the deterioration in the value of the plaintiff's property" (caused by a nuisance), "such recovery would be a bar to any further prosecution for the same cause; but if they were for annoyance merely, and for rendering the air unwholesome, then a similar recovery might be had at every term of the court," so long as the nuisance should continue.⁷

The owner of property alleged to have been injured on a railroad, through neglect of duty on the part of the engineer-driver, may elect to sue either the driver or the railroad company; but it is said, when a jury has found, in an action against the company, that there was no negligence, it is a bar to a recovery against the servant.⁸ Where, however, a person had sued a city, to recover damages for injuries received by reason

¹ 1 Chit. Pl. 179.

² *Vanlandingham v. Ryan*, 17 Ill. 25; *Nispel v. La Parle*, 74 Ill. 306.

³ *Moore v. Rogers*, 19 Ill. 347; *Thompson v. Emmert*, 15 Ill. 415; Chit. Bills, 563, 564.

⁴ *Wann v. McNulty*, 2 Gilm. 355; *Thompson v. Emmert*, 15 Ill. 415;

Benjamin v. McConnell, 4 Gilm. 536; *Mitchell v. Brewster*, 28 Ill. 163; *Jansen v. Grimshaw*, 125 Ill. 468.

⁵ *Leslie v. Bonte*, 130 Ill. 498.

⁶ *Karr v. Barstow*, 24 Ill. 580.

⁷ *R. R. Co. v. Grabill*, 50 Ill. 241.

⁸ *R. R. Co. v. Hutchins*, 34 Ill. 108.

of the leaving of a hatchway in the sidewalk in an unsafe condition, and there was judgment for the city, it was held that this was no bar to a subsequent action, by the person injured, against the person through whose negligence the accident occurred, although he had aided in the defense of the former suit, in pursuance of a notice given to him by the city.¹

The principal Illinois cases, not already cited, relating to this subject, are given in the note below.²

No. 119. Plea of judgment recovered.

(As in No. 85, ante, to the asterisk, and then proceed :) that the plaintiff heretofore impleaded him, the defendant, in the said — court of the said county of —, to the — term of the same court, in the year 18—, in a certain plea of trespass on the case on promises, to the damage of the plaintiff of — dollars, for not performing the very same promises in the said declaration mentioned; and such proceedings were thereupon had in that plea, that afterwards in that same term (or in whatever term the judg-

¹ *Severin v. Eddy*, 52 Ill. 189. See *Goodrich v. Hanson*, 33 Ill. 499.

² *Dalton v. Bently*, 15 Ill. 420; *Foltz v. Prouse*, 15 Ill. 434; *Crabtree v. Wells*, 19 Ill. 55; *McConnel v. Kibbe*, 33 Ill. 175; *Dunning v. City*, 40 Ill. 487; *Shepard v. Butterfield*, 41 Ill. 76; *Lucas v. Le Compte*, 42 Ill. 303; *Dickson v. Todd*, 43 Ill. 504; *McClosky v. McCormick*, 44 Ill. 336; *Lloyd v. Lee*, 45 Ill. 277; *Wells v. Miller*, 45 Ill. 382; *Hamilton v. Quimby*, 46 Ill. 90; *Wright v. Dunning*, 46 Ill. 271; *Gibbs v. Jones*, 46 Ill. 319; *Stilwell v. People*, 49 Ill. 45; *Elston v. Kennicott*, 52 Ill. 272; *Morgan v. Sherwood*, 53 Ill. 171; *Gaddis v. Leison*, 55 Ill. 522; *Briscoe v. Lloyd*, 64 Ill. 33; *Hicks v. Chapin*, 67 Ill. 375; *Rogers v. Higgins*, 57 Ill. 244; *Lathrop v. Hayes*, 57 Ill. 279; *Williams v. Walker*, 62 Ill. 517; *R. R. Co. v. Cobb*, 82 Ill. 183; *Rueger v. R. R. Co.*, 103 Ill. 449; *Tilley v. Bridge*, 105 Ill. 336; *Russell v. Epler*, 10 Bradw. 304; *Schertz v. People*, 105 Ill. 27; *Drake v. Perry*, 58 Ill. 122; *Bliss v. Heasty*, 61 Ill.

338; *Clayes v. White*, 65 Ill. 357; *Hibbard v. Thrasher*, 65 Ill. 479; *Crow v. Bowley*, 68 Ill. 23; *Phillips v. Moir*, 69 Ill. 155; *Howell v. Goodrich*, 69 Ill. 556; *Kelly v. Donlin*, 70 Ill. 378; *Smith v. Wright*, 71 Ill. 167; *Kingsbury v. Buckner*, 70 Ill. 514; *Rudolph v. Ins. Co.*, 71 Ill. 190; *Coal Co. v. Cobb*, 94 Ill. 55; *Pritchard v. Daly*, 73 Ill. 523; *City v. Sansum*, 87 Ill. 182; *Town v. Coolidge*, 89 Ill. 529; *R. R. Co. v. Maher*, 91 Ill. 312; *G. L. Co. v. Howell*, 92 Ill. 19; *G. C. Co. v. People*, 92 Ill. 620; *R. R. Co. v. Goldbery*, 2 Bradw. 228; *Mueller v. Henning*, 102 Ill. 646; *Neff v. Smyth*, 111 Ill. 110; *Jolly v. Fitzgerald*, 23 Ill. App. 514; *Jenkins v. Bank*, 111 Ill. 471; *McCartney v. Osburn*, 118 Ill. 408; *Umlauf v. Umlauf*, 117 Ill. 583; *Drennan v. Bunn*, 124 Ill. 183; *McMillan v. Lovejoy*, 115 Ill. 500; *Dulin v. Prince*, 29 Ill. App. 212; *Richards v. R. R. Co.*, 124 Ill. 516; *Litch v. Clinch*, 136 Ill. 410; *R. R. Co. v. Slater*, 139 Ill. 190; *Nappin v. Abbott*, 51 Ill. 617; *Meier v. Pinover*, 21 Ill. App. 551.

ment was rendered), by the consideration and judgment of the same court, the plaintiff recovered against the defendant the sum of — dollars damages, as well as the costs of the plaintiff in that behalf whereof the defendant was convicted, as by the record thereof still remaining in the same court more fully appears; which said judgment still remains in full force. And this the defendant is ready to verify by the said record; wherefore he prays judgment if the plaintiff ought to have his aforesaid action, etc.

This precedent can readily be adapted to different forms of action; in trespass, for example, the allegation would be that the former action was "for committing the very same trespass," etc. See the observations under the precedents of pleas of payment and accord and satisfaction.

A judgment recovered may be given in evidence under the general issue in assumpsit, debt on simple contract, and case, but in debt on a specialty, and in covenant and trespass, it must be pleaded.¹ If a judgment has in fact been recovered, it is advisable to plead it specially.²

No. 120. Replication to a plea of judgment recovered.

(*Venue, and title of cause.*)

And the plaintiff, as to the said plea of the defendant, by him — above pleaded, says, *precludi non*, because he says, that the said several promises and undertakings in the said declaration mentioned, were not, nor was any or either of them, any of, or any one of the same identical promises and undertakings as those or any of those in the said plea mentioned, and for and in respect whereof the said supposed judgment in the said plea mentioned was recovered, in manner and form as the defendant has above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

E. F., Att'y for Pl'ff.

It would seem that whenever the plaintiff has in truth recovered a judgment, for a cause of action similar to that mentioned in the declaration, and the defendant pleads such recovery in bar, a new assignment is necessary;³ but according to the authority of some cases, the plaintiff may take issue on the allegation that the promises are the same, by a replication

¹ 1 Chit Pl. 418, 422, 426, 429, 432, 441; Gould's Pl. 303-311; *Wann v. McNulty*, 2 Gilm. 355; *Cook v. Vi-mont*, 6 Monroe 284; *Miller v. Man-ice*, 6 Hill 124.

² 3 Chit Pl. 929, note.

³ 1 Esp. 452; 3 Chit. Pl. 1213, note; see 1 Chit. Pl. 542 *et seq.*

denying it, as in the above form,¹ for which see a precedent, 3 Chit. Pl. 1213. A case in 3 Levinz's Reports, p. 92, is cited, in which it was held that to a justification in trespass, concluding with a statement that the trespasses mentioned in the plea were those mentioned in the declaration, the plaintiff could not reply that they were not the same without showing some other trespass.² See a form of new assignment to a plea in abatement, *ante*, No. 9*a*. If the plaintiff wishes to deny the alleged former recovery, the replication will be *nul tiel record*, which can be framed from the precedent No. 9, *ante*.

PLEA OF TENDER.

To make a valid tender of money, the debtor must produce the precise sum due, in current money such as is by law made legal tender, and must actually offer it to the creditor; to make a valid tender of goods, the specific articles agreed for must be produced at the place agreed upon, and offered to the other party.³ The tender must cover the entire debt,⁴ and must be absolute and not hampered by conditions.⁵ A tender must be pleaded specially, in every form of action.⁶ The plaintiff may at once take out of court the sum tendered, even though he denies the tender.⁷

The plaintiff may reply a demand made, and a refusal to pay, before⁸ or after⁹ the tender—as this, if established, shows that the defendant was not always ready and willing to pay.¹⁰ But a prior demand, in order to defeat the tender, must not

¹ *Bagot v. Williams*, 3 B. & Cres. 235; *Seddon v. Tutop*, 6 T. R. 607; 3 Wils. 384.

² 3 Chit. Pl. 1213, note.

³ Am. & Eng. Ency. Law, Vol. 25, 901 and cases there cited.

⁴ *Moore v. Newman*, 43 Minn. 428; *Rose v. Duncan*, 49 Ind. 269; *Weid v. Adams*, 152 Mass. 74; *Montague v. Tongan*, 68 Mich. 98; *Patnote v. Sanders*, 41 Vt. 66; *Brandt v. R. R.*, 26 Iowa 114; *Helphley v. R. R.*, 29 Iowa 480.

⁵ *Pulsifer v. Shepard*, 36 Ill. 513; *Sanford v. Bulkley*, 30 Conn. 344;

Cothran v. Scanlan, 34 Ga. 555; *Rose v. Duncan*, 49 Ind. 269; *Shaw v. Sears*, 3 Kans. 236; *Richardson v. Boston*, 9 Met. 42; *Henderson v. Cass*, 107 Mo. 50.

⁶ 1 Chit. Pl. 420-422-426-429-511.

⁷ 2 Swan's Pr. 709.

⁸ *Hume v. People*, 8 East 168; *Birks v. Treppet*, 1 Saund. 33; Bul. N. P. 156; *Goodland v. Blewith*, 1 Camp. 478; 2 Swan's Pr. 710.

⁹ 3 Went. 180; *Spybey v. Hide*, 1 Camp. 181.

¹⁰ See forms, 3 Chit. Pl. 1154-1155; 1 Chit Pl. 501.

have been of a larger sum than the amount tendered;¹ and to sustain a replication of a subsequent demand, the plaintiff must prove a demand of the precise sum tendered.² A tender is *stricti juris*, and must be clearly proved.³ A tender to a lawyer, or clerk, who is authorized to collect the money, is good.⁴ In order to keep a tender good,⁵ it is not necessary to bring the money into court, and deposit it, but it is sufficient if the money is in readiness when ordered by the court; at least this is the rule in equity.⁶ A tender must be kept good, and the money must be ready to be delivered within a reasonable time after the acceptance of it is signified.⁷ In a case where a tender was pleaded, and no other plea, but the money was not brought into court, and the defendants refused to comply with an order to bring it in, it was held proper for the court to disregard the plea, and give judgment for the plaintiffs; or, it was said, the plea might have been stricken from the files.⁸

A person making tender can not insist upon a receipt in full, but he must rely on the tender.⁹ To avoid costs it must be made before the suit is commenced.¹⁰ By the statute "a tender may also be made after an action is brought upon any contract, of the whole sum due thereon, with the legal costs of

¹ See *Rivers v. Griffith*, 5 B. & A. 630; see 1 Esp. 151; *Spybey v. Hide*, 1 Camp. 181.

² *Rivers v. Griffith*, 5 B. & A. 630; see *Spybey v. Hide*, 1 Camp. 181.

³ *Buchenau v. Horney*, 12 Ill. 336; *Kerney v. Gardner*, 27 Ill. 162.

⁴ 14 Eng. Com. Law 385; see Starr & Curtis' Stat. 2387; Rev. Stat. (1893) 1425; Rev. Stat. (1895) 1523.

⁵ *Doerr v. Brune*, 56 Ill. App. 657.

⁶ *Webster v. French*, 11 Ill. 254; *Mohn v. Stoner*, 11 Iowa 30; *Colby v. Stevens*, 38 N. H. 191; *Stow v. Russell*, 36 Ill. 18; *Aulger v. Clay*, 109 Ill. 487.

⁷ *Sloan v. Petrie*, 16 Ill. 262; *Knox v. Light*, 12 Ill. 86; *Town v. Trow*,

24 Pick. 168; *Marine Band v. Rushmore*, 28 Ill. 463; *Pulsifer v. Shepard*, 36 Ill. 513; *Wood v. Trust Co.*, 41 Ill. 267; *Webster v. Pierce*, 35 Ill. 158; *McDaniel v. Upton*, 45 Ill. App. 151; *Brooks v. Lawyer*, 61 Ill. App. 366.

⁸ *Knox v. Light*, 12 Ill. 86.

⁹ *Thayer v. Brackett*, 12 Mass. 450; *Wagenblast v. McKean*, 2 Grant's Cases 393; *Hamar v. Dimick*, 14 Ind. 105; *Pulsifer v. Shepard*, 36 Ill. 513; *Wood v. Hitchcock*, 20 Wend. 47; *Roosevelt v. Bank*, 45 Barb. 583; *Sanford v. Bulkley*, 30 Conn. 344.

¹⁰ *Winningham v. Redding*, 6 Jones' Law (N. C.) 126; *Barker v. Brink*, 5 Clarke (Iowa) 481.

suit incurred up to the time of tender.¹ But it does not apply to unliquidated damages growing out of a contract.²

A person guilty of a tort may avoid costs by a tender as provided in section 6 of chapter entitled "Tender."³ An actual count of money may not be required if the party to whom it is offered absolutely refuses to receive it. But this may not dispense with the existing ability to make the payment, and having the money within convenient reach.⁴

The money tendered must at all times be kept in readiness for the creditor, and not used by the debtor, and when pleaded at law it must be brought into court for the creditor. It is in this way only that the debtor can escape the payment of interest and costs.⁵ A plea of tender admits the amount named therein to be due, and the debtor is estopped from denying it;⁶ but only to that extent and no further.⁷

A tender of money in a handkerchief, with a statement of the amount and kind, is sufficient.⁸ But a tender must be of a specific sum, and without any terms or conditions.⁹ Unless objection is made to the kind of money offered, a tender of bank notes, certificate of deposit or bank check is good.¹⁰

Where a plea of tender of damages presents the only issue in the case the only question for the jury to determine is the

¹ 2 Starr & Curtis' Stat. 2386; Rev. Stat. (1893), 1425; Rev. Stat. (1895), 1523; *Frantz v. Rose*, 89 Ill. 590; *Beach v. Jeffrey*, 1 Bradw. 283; *McDaniel v. Upton*, 45 Ill. App. 151.

² *Gregory v. Wells*, 62 Ill. 232; *Bock v. Weigant*, 5 Bradw. 643.

³ 2 Starr & Curtis 2387; Rev. Stat. (1893) 1425; Rev. Stat. (1895), 1523; *Frantz v. Rose*, 89 Ill. 590; *Beach v. Jeffrey*, 1 Bradw. 283; *Dunbar v. DeBoer*, 44 Ill. App. 615; *Miller v. Gable*, 30 Ill. App. 578.

⁴ *Wynkoop v. Cowing*, 21 Ill. 570; *Steele v. Biggs*, 22 Ill. 643; *Ventres v. Cobb*, 105 Ill. 33; *Gorham v. Farson*, 119 Ill. 425.

⁵ *Aulger v. Clay*, 109 Ill. 487; *Crain v. McGoon*, 86 Ill. 431; *Thayer*

v. Meeker, 86 Ill. 470; *Carr v. Miner*, 92 Ill. 604; *Wood v. Trust Co.*, 41 Ill. 267; *DeWolf v. Long*, 2 Gilm. 679; *Stow v. Russell*, 36 Ill. 18; *Knox v. Light*, 12 Ill. 86; *Webster v. Pierce*, 35 Ill. 158; *O'Riley v. Suver*, 70 Ill. 85; *Wright v. McNeely*, 11 Ill. 241; *Leonard v. Patton*, 106 Ill. 99; *McDaniel v. Upton*, 45 Ill. App. 151.

⁶ *Monroe v. Chaldeck*, 78 Ill. 429; *Chitty on Cont.* 793-802; *Sweetland v. Tuthill*, 54 Ill. 215.

⁷ *Brix v. Ott*, 101 Ill. 70; see *Ry. Co. v. Kamman*, 119 Ill. 362.

⁸ *Davis v. Stonestreet*, 4 Ind. 101; see *Conway v. Case*, 22 Ill. 127.

⁹ *Pulsifer v. Shepard*, 36 Ill. 513.

¹⁰ *Snow v. Perry*, 9 Pick. 539; *Gradle v. Warner*, 140 Ill. 123.

amount of damages to be awarded.¹ A tender may be withdrawn at any time before it is accepted.² When the jury finds the issue of tender for the defendant the proper practice requires the court to render judgment in favor of the defendant for costs, with leave to the plaintiff to take the money out of court.³

No. 121. *Tender*—Non assumpsit *except as to the sum tendered, and plea of tender as to that sum.*

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } *Assumpsit.*

A. B. } And the defendant, by E. F., his attorney, comes and defends, etc., when, etc., and as to all the several supposed promises in the said declaration mentioned except as to the sum of ——— dollars (*the sum tendered*), parcel of the several sums of money in the said declaration mentioned, (*or if some of the counts are denied altogether, say “in the said first and third counts mentioned,”*) says that he did not promise in manner and form as the plaintiff has above complained against him, the defendant: And of this he put himself upon the country, etc.

And as to the said sum of ——— dollars, parcel of the said several sums of money in the said declaration mentioned (*or as above in the parentheses*), the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, to recover any greater damages than that sum of money, because he says, that after the making of the said several promises in the said declaration (*or “in the said ——— counts”*) mentioned, as to the said sum of ——— dollars, parcel, etc., and before the commencement of this suit, to wit, on, etc., in, etc., he, the defendant, was ready and willing and then and there tendered and offered to pay to the plaintiff the said sum of ——— dollars, parcel, etc., to receive which of the defendants the plaintiff then and there wholly refused: And the defendant further says, that ever since the making of the said several promises as to the said sum of ——— dollars, parcel, etc., he has been, and still is, there ready to pay to the plaintiff that sum of money; and the defendant now brings the same into the court here, ready to be paid to the plaintiff, if he will accept the same. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action to recover any greater damages than the said sum of ——— dollars, parcel, etc.

If the money has been paid into court before plea pleaded, say “and the defendant has paid the same into the said court, ready,” etc.

¹ *Ry. Co. v. Hogan*, 56 Ill. App. 577; *Frew v. R. R. Co.*, 57 Ill. App. 42.

² *Frew v. R. R. Co.*, 57 Ill. App. 42.

³ *Doerr v. Brune*, 56 Ill. App. 657.

A defendant can not plead *non assumpsit* as to the whole of the demand, and a tender as to part, but must qualify the general issue and his other pleas as above, admitting the liability as to the sum tendered.¹ As to that sum no other plea can be pleaded than that of tender.²

A further special plea, following the plea of tender, commences thus: "And for a further plea in this behalf, as to all the said several supposed promises in the said declaration mentioned, except as to the said sum of — dollars, parcel, etc., the defendant says that the plaintiff ought not have his aforesaid action," etc. The prayer in the conclusion is for "judgment if the plaintiff ought to have his aforesaid action against him, the defendant, except as to the said sum of — dollars, parcel," etc. In a plea of set-off, pleaded with a plea of tender, the defendant alleges that the "said sums of money so due from the plaintiff to the defendant exceed the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said several supposed promises, except as to the said sum of — dollars, parcel," etc., and offers to set off, out of the sums so due, "the full amount of the said damages, except as aforesaid;" and if money has been paid into court, that fact is alleged.³

An actual tender must in general be averred. It seems, however, that if the plaintiff expressly dispensed with the production of the money, the plea should especially allege such dispensation or discharge, after alleging that the defendant was ready, etc., and was about to tender, etc.⁴

In *debt* on simple contract, the defendant pleads, "as to the several sums of money in the said declaration mentioned, and thereby demanded, except as to the sum of — dollars, parcel thereof," *nil debet*. The plea of tender then follows, in nearly the same form as in *assumpsit*, but in the commencement and conclusion the language is, "to recover any damages by reason of the non-payment of the said sum of — dollars, parcel," etc.

¹ Chit. Pl. 478; 3 Chit. Pl. 922, note;
4 T. R. 194; *Spybey v. Hyde*, 1 Camp.
184, note; Swan's Pr. 709, note.

² 3 Chit. Pl. 922, note; 3 Wills. 145;
2 Bla. R. 723; Swan's Pr. 709, note.

³ 3 Chit. Pl. 923, 924.

⁴ Swan's Pr. 709 note; *Read v. Goldring*, 2 M. & Sc. 86; *Finch v. Brook*, 1 Bing. (N. C.) 253.

and the defendant alleges a readiness to pay "when the said sum of — dollars, parcel, etc., became due," and ever since, and a tender of that sum after it became due, etc.¹

In an action on a *covenant* for the payment of money, the plea of tender is substantially the same as in *assumpsit*, but the limitation in the commencement is "as to the supposed breach of covenant *first* above assigned, so far as the same relates to the sum of — dollars, parcel of the sum of — dollars in the said declaration mentioned," etc.;² and the plea alleges that "after the said sum of — dollars, parcel, etc., became due," etc., the defendant was ready, etc., and tendered, etc., and that from the time that sum became due he has been ready, etc., and concludes as in *assumpsit*, but with the additional words, "on occasion of the said supposed breach of covenant *first* above assigned," etc.

In an action for a *trespass* committed by cattle, to land, the defendant may plead a tender of sufficient amends;³ and in *replevin* for cattle taken *damage feasant*, the plaintiff may plead a tender of amends before the impounding.⁴

No. 122. *Similiter to general issue, and replication to plea of tender, denying it.*

In the ——— Court.

— Term, 18—

A. B. }
 vs. } *Assumpsit.*
 C. D. } And the plaintiff, as to the plea of the defendant by him first above pleaded, and whereof he has put himself upon the country, does the like.

And as to the said plea of the defendant by him above pleaded as to the said sum of — dollars, parcel, etc., the plaintiff says that he ought not, by reason of anything in that plea alleged, to be barred from having his afore-said action to recover further damages than that sum of money, because he says, that the defendant did not tender or offer to pay to him, the plaintiff, the sum of — dollars, parcel, etc., in manner and form as the defendant has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

When a tender can be proved, and the plaintiff is prepared

¹ 3 Chit. Pl. 955.

⁴ 1 Chit. Pl. 511, 512; 3 Chit. Pl.

² 3 Chit. Pl. 1021.

1198.

³ 1 Chit. Pl. 441; 3 Chit. Pl. 1066.

to prove more to be due than the sum tendered, the following replication is proper.¹

No. 123. Replication to No. 121, admitting the tender.

(Similiter to general issue, as in last precedent.) And the plaintiff, inasmuch as he can not deny but that the defendant did tender and offer to pay to him, the plaintiff, the said sum of — dollars, parcel, etc., in manner and form as the defendant has above in his said *second* plea alleged, freely takes and accepts the same out of the court here; therefore, as to the said sum of — dollars, the plaintiff is satisfied, etc.

See on the subject of Tender generally, the additional Illinois cases given in the note.²

PLEAS BY SURETY.

Further time given to principal.—It seems this defense may be proved under the general issue.³ Matters affecting

¹ 3 Ch. Pl. 1156, note; 1 Chit. Pl. 501.

² *Lincoln v. Cook*, 2 Scam. 61; *Bush v. Shipman*, 4 Scam. 186; *Doyle v. Teas*, 4 Scam. 202; *DeWolf v. Long*, 2 Gilm. 679; *Keys v. Jasper*, 4 Scam. 305; *Wright v. McNeely*, 11 Ill. 241; *Webster v. French*, 11 Ill. 254; *People v. Dubois*, 18 Ill. 333; *Morgan v. Herrick*, 21 Ill. 481; *Conway v. Case*, 22 Ill. 130; *Smith v. Lamb*, 26 Ill. 396; *Blunt v. Tomlin*, 27 Ill. 93; *Dodge v. Deal*, 28 Ill. 304; *Wolf v. Willitts*, 35 Ill. 88; *Staat v. Evans*, 35 Ill. 455; *Hammer v. Kaufman*, 39 Ill. 87; *White v. Thomas*, 39 Ill. 227; *Headley v. Shaw*, 39 Ill. 354; *Hunter v. Rilyea*, 39 Ill. 368; *Vroman v. Darrow*, 40 Ill. 171; *McPherson v. Gale*, 40 Ill. 368; *McPherson v. Walker*, 40 Ill. 371; *Nelson v. Oren*, 41 Ill. 19; *Supervisors v. Heneberg*, 41 Ill. 180; *Mears v. Nichols*, 41 Ill. 207; *Ryan v. Brant*, 42 Ill. 78; *Leake v. Brown*, 43 Ill. 372; *Hanna v. Ratkin*, 43 Ill. 462; *Dwen v. Blake*, 44 Ill. 135; *McPherson v. Hall*, 44 Ill. 264; *Higgins v.*

Halligan, 46 Ill. 173; *City v. Wider*, 46 Ill. 351; *City v. Wehrung*, 46 Ill. 392; *Boston v. Nichols*, 47 Ill. 354; *Cilley v. Hawkins*, 48 Ill. 308; *Smith v. Gillett*, 50 Ill. 290; *Liebrandt v. Myron*, 61 Ill. 81; *Smith v. Sheldon*, 65 Ill. 219; *Jenks v. Burr*, 56 Ill. 540; *Loomis v. Stave*, 72 Ill. 623; *Reinback v. Crabtree*, 77 Ill. 182; *Ry. Co. v. Noe*, 77 Ill. 513; *Sanborn v. Benedict*, 78 Ill. 309; *Berger v. Patterson*, 78 Ill. 633; *Bradley v. Parks*, 83 Ill. 169; *Carr v. Miner*, 92 Ill. 604; *Harding v. Loan Co.*, 84 Ill. 251; *Downing v. Plate*, 90 Ill. 268; *Comstock v. Gage*, 91 Ill. 328; *Longfellow v. Moore*, 102 Ill. 289; *Plumb v. Taylor*, 27 Ill. App. 238; *Lyman v. Gedney*, 114 Ill. 395; *Dulin v. Prince*, 124 Ill. 76; *Doyle v. Sanford*, 26 Ill. App. 156; *Wing v. Beach*, 31 Ill. App. 85; *Cheney v. Roodhouse*, 135 Ill. 268; *Manistee v. Bank*, 143 Ill. 490; *Bank v. Manister*, 43 Ill. App. 525; *Hollenberg v. Tompkins*, 49 Ill. App. 323; *Day v. Inv. Co.*, 153 Ill. 293.

³ *Warner v. Crane*, 20 Ill. 148.

the surety only, should be pleaded by him alone.¹ In England the rule is said to have prevailed, that the remedy of the surety, where further day of payment has been given without his consent, is only in chancery, unless the fact that he is such surety appears on the face of the contract; and some courts in the United States have followed the same rule. But the weight of authority, in this country, is to the effect that the surety may show that such was his relation to the contract, and avail himself of this defense, in a suit at law, although he appears as a principal in the contract.²

Where a note is taken, with personal security, and at the same time other security therefor—as for instance a mortgage on land—is existing or taken, the destruction of such other security, by the holder of the note, without the consent of the sureties, will release the latter.³

The contract of a surety is to be construed strictly, both at law and in equity, and his liability is not to be extended by implication beyond the terms of his undertaking, as understood when the contract was made.⁴ It is a general rule that mere delay to sue does not discharge the surety;⁵ but where a creditor, without the assent of the surety, gives further time of payment to the principal, the surety is discharged, both at law and in equity.⁶

¹ *Beesley v. Hamilton*, 50 Ill. 88.

² *Flynn v. Mudd*, 27 Ill. 323; *Ward v. Stout*, 32 Ill. 399; *Rogers v. Trustees*, 46 Ill. 428.

³ *Rogers v. Trustees*, 46 Ill. 428.

⁴ *Reynolds v. Hall*, 1 Scam. 35; *People v. Moon*, 3 Scam. 123; *Field v. Rawlings*, 1 Gilm. 581; *Waters v. Simpson*, 2 Gilm. 570; *Ryan v. Trustees*, 14 Ill. 20; *Flynn v. Mudd*, 27 Ill. 323; *Tipton v. Carrigan*, 10 Bradw. 318; *Grindal v. Ruby*, 14 Bradw. 439; *Ins. Co. v. Johnson*, 120 Ill. 622; *Vinyard v. Barnes*, 124 Ill. 346.

⁵ *Moreland v. State Bank*, Breese 263; *People v. White*, 11 Ill. 341; *Pearl v. Wellman*, 11 Ill. 352; *Kirby*

v. Studebaker, 15 Ind. 45; *Hunt v. Bridgeman*, 2 Pick. 581; see *Brown v. Haggerty*, 26 Ill. 469; *Grabfetter v. Willis*, 10 Bradw. 330; *Wittmer v. Ellison*, 72 Ill. 301.

⁶ *Davis v. People*, 1 Gilm. 409; *Gardiner v. Harbeck*, 21 Ill. 129; *Ward v. Stout*, 32 Ill. 399; *Pilgrim v. Dykes*, 24 Texas 383; *Phares v. Barbour*, 49 Ill. 370; see *Farwell v. Meyers*, 35 Ill. 40; *Galbraith v. Fullerton*, 53 Ill. 126; *Bank v. Waterman*, 134 Ill. 467; *Reynolds v. Barnard*, 36 Ill. App. 221; *Edmonds v. Thomas*, 41 Ill. App. 507; *Truesdell v. Hunter*, 28 Ill. App. 296; *Brokaw v. Field*, 33 Ill. App. 141.

A promise to delay the collection of a debt for an uncertain period will not discharge a surety.¹ To discharge the surety by extension of time, there must be a sufficient consideration, and a time definitely fixed.² But an equitable estoppel may sometimes result, which will prevent a recovery against a guarantor, where an agreement has been executed, although there was no consideration for such agreement.³

An agreement, for a good consideration, between the holder of a note and the principal, to extend the time of payment for a definite period, will discharge the surety, unless he consents to such agreement at the time, or subsequently ratifies it.⁴ To enable a surety to interpose the defense to a note that further time was given to the principal, it is not necessary that his name should appear upon the note as surety. It will be sufficient if he was actually a surety, and this was known to the payee when the note was given;⁵ and the fact that he was a surety may be proved by verbal testimony. The payee of a note is presumed to know the relation which the parties thereto sustain to each other, and to accept the note with that knowledge.⁶

The payment of interest upon a note in advance, is a sufficient consideration to support an agreement with the principal for an extension of time, so as to discharge the surety.⁷ An agreement, after the maturity of a note, to pay the interest thereon at the rate therein specified, and also one hundred

¹ *Gardner v. Watson*, 13 Ill. 347; *Hunt v. Knox*, 34 Miss. 655; *Alcock v. Hill*, 4 Leigh. 622; *Villars v. Palmer*, 67 Ill. 204.

² *Gardner v. Watson*, 13 Ill. 347; *Woolford v. Dow*, 34 Ill. 424; *Imming v. Fielder*, 8 Bradw. 256; *Waters v. Simpson*, 2 Gilm. 570; *Meyers v. Bank*, 78 Ill. 257; *Kriz v. Pokrok*, 46 Ill. App. 418.

³ *White v. Walker*, 31 Ill. 422.

⁴ *Flynn v. Mudd*, 27 Ill. 323; *Gardner v. Watson*, 13 Ill. 347; *Gardiner v. Harbeck*, 21 Ill. 129; *Hinds v. Ingham*, 31 Ill. 400; *Woolford v. Dow*, 34 Ill. 424; *Bradshaw v. Combs*,

102 Ill. 428; *Dodgson v. Hendersm*, 113 Ill. 364; *Truesdell v. Hunter*, 28 Ill. App. 292; *Reynolds v. Barnard*, 36 Ill. App. 218; *Barnard v. Reynolds*, 49 Ill. App. 596; *Kerns v. Ryan*, 26 Ill. App. 177; *Bank v. Waterman*, 134 Ill. 461.

⁵ *Flynn v. Mudd*, 27 Ill. 323; *Ward v. Stout*, 32 Ill. 399; *Rogers v. Trustees*, 46 Ill. 428.

⁶ *Ward v. Stout*, 32 Ill. 399.

⁷ *Warner v. Campbell*, 26 Ill. 282; *Flynn v. Mudd*, 27 Ill. 323; *Montague v. Mitchell*, 28 Ill. 481; *Woolford v. Dow*, 34 Ill. 424.

dollars every month until it is discharged, entered into between the payee and the principal debtor, without the knowledge or consent of a surety, does not constitute a valid agreement to extend the time of payment; not being supported by a new consideration, it will not discharge the surety from liability on the note.¹

Any operative agreement, founded upon a valuable consideration, by which the holder of a note agrees to give time to the principal, without the assent of the surety, will release the latter; and this whether before or after the maturity of the note.² The agreement must, however, be a binding one, and not unlawful by reason of usury or other matter.³ Any change in an agreement, without the assent of the surety, releases him;⁴ but it is otherwise if he consents to or approves of such change.⁵ A parol agreement to vary a contract under seal can not be pleaded in a court of law to defeat a recovery on such contract; and such an agreement will not discharge a surety from liability.⁶

Notice by surety to creditor to prosecute.—We will next consider when a surety may discharge himself by giving the creditor written notice to prosecute the principal.

The first section of the statute, entitled "Sureties," provides:

"That when any person bound as surety for another for the payment of money, or the performance of any other contract in writing, apprehends that his principal is likely to become insolvent or to remove from the state without discharging the contract, if a right of action has accrued on the contract, he may, by writing, require the creditor forthwith to sue upon the same; and unless such creditor shall, within a reasonable time and with due diligence, commence suit thereon and prosecute the same to final judgment and execution, the surety

¹ *Woolford v. Dow*, 34 Ill. 424; see *Gardner v. Watson*, 13 Ill. 347.

² *Warner v. Crane*, 20 Ill. 148; *Warner v. Campbell*, 26 Ill. 282; see *Farwell v. Meyer*, 35 Ill. 40.

³ *Galbraith v. Fullerton*, 53 Ill. 126.

⁴ *Cunningham v. Wrenn*, 23 Ill. 64; *Gardiner v. Harbeck*, 21 Ill. 129.

⁵ *Gardiner v. Harbeck*, 21 Ill. 129; *Hinds v. Ingham*, 31 Ill. 400.

⁶ *Chapman v. McGrew*, 20 Ill. 101; but see *White v. Walker*, 31 Ill. 422.

shall be discharged; but no such discharge shall in any case affect the rights of the creditor against the principal debtor.”

The undertaking of a surety is absolute in its terms, and he is not permitted to discharge himself by requesting the creditor to proceed against his principal.² The rights of the creditor against the surety are not impaired by mere delay, except where the surety has the right to require the creditor to prosecute the principal, and insists on the right by giving notice in writing to prosecute.³

To release the surety there must be a written notice by him to the holder of the obligation to bring suit, served personally, and a neglect to comply therewith.⁴ Where there are two or more sureties on a note, a notice to sue given by one surety on his own behalf, will not operate to discharge another surety who does not give notice.⁵ A plea by a surety which is substantially in the language of the statute is sufficient.⁶

In the case of *Payne v. Webster*, 19 Ill. 103, the plea contained no averment of notice that the defendant was a surety in the note, but alleged that he “signed the said note as security;” and the court, holding it good, said that to sustain that plea it must appear on the face of the note that the defendant signed it in that character. But it would seem from the case of *Ward v. Stout*, 32 Ill. 399, that where a surety on a promissory note seeks to avail himself of a failure on the part of the creditor, after notice given to bring suit, the suretyship may be established by evidence outside of the note. To allow this, the court says, does no violence to the rule that a written instrument can not be varied by verbal testimony, for

¹ 2 Starr & Curtis, 2372; Rev. Stat. (1893), 1420; Rev. Stat. (1895), 1518; *Villars v. Palmer*, 67 Ill. 204; *House v. Trustees*, 83 Ill. 368; *Taylor v. Beck*, 13 Ill. 376; *Bank v. Pierce*, 99 Ill. 272; *Miller v. Gray*, 31 Ill. App. 453; *Trustees v. Southard*, 31 Ill. App. 359; *Dallemand v. Bank*, 54 Ill. App. 600.

² *Taylor v. Beck*, 13 Ill. 376; *Carr v. Howard*, 8 Blackf. (Ind.) 190.

³ *People v. White*, 11 Ill. 341; *Pearl v. Wellman*, 11 Ill. 352.

⁴ *Bartlett v. Cunningham*, 85 Ill. 22; *Tipton v. Carrigan*, 10 Bradw. 318; *Imming v. Fielder*, 8 Bradw. 256.

⁵ *Wilson v. Tebbets*, 29 Ark. 579; *Routon v. Lacey*, 17 Mo. 399; *Letcher v. Yantes*, 3 Dana 160; *Klingensmith v. Klingensmith*, 31 Penn. St. 460; *Alford v. Baxter*, 36 Vt. 158; *Trustees v. Southard*, 31 Ill. App. 359.

⁶ *Imming v. Fielder*, 8 Bradw. 256; *Payne v. Webster*, 19 Ill. 102.

such proof of the suretyship does not affect the terms of the contract, but merely establishes a collateral fact and rebuts a presumption.

The gratuitous giving of time by creditor to principal does not discharge the surety, though the latter gave *verbal* notice to the creditor to sue the principal, who was then solvent but afterwards became insolvent.¹ But if the notice given was in writing, the creditor must sue in a reasonable time, or the surety will be discharged.²

See statute relating to sureties on official bonds, sureties on executor's, administrator's and guardian's bonds, and sureties on negotiable instruments, etc.

Death of principal—Diligence against estate.—Section 3 of the act relating to Sureties, provides that "Whenever the principal maker of any note, bond, bill or other instrument in writing shall die, if the creditor shall not, within two years after the granting of letters testamentary or of administration, present the same to the proper court for allowance, the sureties thereon shall be released from the payment thereof to the extent that the same might have been collected of such estate if presented in proper time, but this section shall not be construed to prevent the holder of any such instrument from proceeding against the sureties within said two years."³

But the holder is not prevented from suing the surety within the two years allowed for filing claims. The holder's right is barred only by a failure for two years to file a claim against the estate, and failing to sue the surety. He may sue the surety during such period.⁴

Any consideration which is sufficient to support the promise of the principal will sustain the promise of the surety.⁵

¹ *Carr v. Howard*, 8 Blackf. (Ind.), 190; *Wittmer v. Ellison*, 72 Ill. 301; see *Taylor v. Beck*, 13 Ill. 376.

² *Reid v. Cox*, 5 Blackf. (Ind.), 312; *Overturf v. Martin*, 2 Ind. 507; *McAllister v. Ely*, 18 Ill. 250; *Ward v. Stout*, 32 Ill. 399.

³ 2 Starr & Curtis, 2373; Rev. Stat. (1893), 1420; Rev. Stat. (1895), 1518; *House v. Trustees*, 83 Ill. 368; *Curry*

v. Mack, 90 Ill. 606; *Tipton v. Carrigan*, 10 Bradw. 318.

⁴ *Grindol v. Ruby*, 14 Bradw. 439; *Villars v. Palmer*, 67 Ill. 204; *Huddleston v. Francis*, 124 Ill. 196.

⁵ *Pritchett v. People*, 1 Gilm. 525; *U. S. v. Linn*, 15 Peters (U. S.), 290; *Leonard v. Vredenburg*, 8 Johns. 29.

No. 124. Plea by surety (to declaration on promissory note, with common counts), that without his assent creditor gave further time to principal.

(*First plea, non assumpsit, as ante, No. 82 :*) And for a further plea in this behalf, the said E. F. says that the plaintiff ought not to have his aforesaid action against him, the said E. F., because he says, that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action; and that the promissory note in that count mentioned was made and delivered to the *plaintiff* by the said C. D. (*the other defendant*), as principal debtor, and by him, the said E. F., as surety for the said C. D., and not otherwise, whereof the plaintiff, at the time of the making and delivery of the said note as aforesaid, there had notice (*); and that when (*or "before," or "after," as the case may be*), the said note became due, to wit, on, etc., the plaintiff, at the request of the said C. D., and in consideration (*here state the consideration according to the fact*), there agreed with the said C. D. to give, and did then and there give to him further day of payment of the amount of the said note, to wit, until the — day of — then next ensuing, without the knowledge or consent of him the said E. F., by reason whereof he, the said E. F., became discharged from all liability upon the said note. And this he, the said E. F., etc. (*conclude with a verification, as in No. 85, ante*).

To the above plea the plaintiff may reply that the defendant did not execute the note as surety; or that there was no such agreement as therein alleged; or that the giving of further day of payment was with the knowledge and consent of the surety, or was ratified by him.

No. 125. Plea by surety (to declaration on promissory note, with common counts), that creditor was required in writing to put note in suit, but did not.

(*As in the last precedent, to the asterisk, and then proceed:*) and that after the said note became due, to wit, on, etc., he, the said E. F. (apprehending that the said C. D. was likely to become insolvent, [*or, "to migrate from this state,"*]) without previously discharging the said note, so that it would be impossible or extremely difficult for him, the said E. F., after being compelled to pay the money due by the said note, to recover the same from the said C. D.,) did there require the plaintiff, by notice in writing, forthwith to put the said note in suit; but that, nevertheless, the plaintiff did not, within a reasonable time thereafter, commence suit on the said note, and proceed with due diligence, in the ordinary course of law, to recover a judgment for, and by execution to make, the amount due by the said note; by means whereof, and by force of the statute, etc., the plaintiff has forfeited all right to demand that amount of him, the said E. F. And this he, etc. (*conclude with a verification, as in No. 85, ante*).

PLEA OF BREACH OF WARRANTY.

Damages arising from a breach of warranty may be proved under the general issue, by way of recoupment.¹

See the observations under the forms of declarations on warranties, *ante*, and the authorities there cited; and see also the authorities hereafter cited, relating to want and failure of consideration.

A plea which avers that a note was given for a boiler and fire-place, and for the warranty of the same to be of a certain quality, and avers a breach of that warranty, and that they were valueless, shows a failure of consideration, and is a good plea.² A manufacturer who sells a boiler, impliedly warrants that it is well made, and of sound material.³

Where a manufacturer vends his own articles, there is an implied warranty that they are manufactured in a workman-like manner. It is otherwise if he is only a vendor; in that case, if there is neither fraud nor warranty, the purchaser buys at his peril.⁴ If a purchaser directs as to the manufacture of an article, the manufacturer is not then held liable for any insufficiency caused by following such direction.⁵

No particular form of words is necessary to establish a contract of warranty, but it must appear that the alleged warrantor intended to bind himself to make good the quality of the article sold; and the evidence should show that this made a part of the consideration of the bargain.⁶ A warranty, in order to be valid, must be made at the time of sale; or if made afterward, it must be upon a new consideration.⁷ Where a party is to deliver a quantity of corn, (not bought on inspection,) under an executory contract, the law will imply a war-

¹ *Babcock v. Trice*, 18 Ill. 420; *Crabtree v. Kile*, 21 Ill. 180; see *Stow v. Yarwood*, 14 Ill. 24; *Stookey v. Hughes*, 18 Ill. 55; *Seeley v. People*, 27 Ill. 173; *Story on Sales*, 393.

² *Beers v. Williams*, 16 Ill. 69; *Oertel v. Schroeder*, 48 Ill. 133.

³ *Beers v. Williams*, 16 Ill. 69; *Cemetery v. Smith*, 32 Ill. 253; see *Sears v. Crozier*, 53 Ill. 245.

⁴ *Archdale v. Moore*, 19 Ill. 565;

Misner v. Granger, 4 Gilm. 69; *Leather Co. v. Reissig*, 48 Ill. 75; *Phelan v. Andrews*, 52 Ill. 486.

⁵ *Archdale v. Moore*, 19 Ill. 565.

⁶ *Adams v. Johnson*, 15 Ill. 345; *Ender v. Scott*, 11 Ill. 35; *Hawkins v. Berry*, 5 Gilm. 36; *Wheeler v. Reed*, 36 Ill. 81; see *Richards v. Betzer*, 53 Ill. 466.

⁷ *Towell v. Gatewood*, 2 Scam. 23.

ranty that it is to be of a fair and merchantable quality.¹ The acceptance of the corn by a warehouseman, or by the purchaser himself, is not a waiver of this implied warranty.²

The purchaser of an article not warranted as to quality, must take the hazard of his bargain. If he was not to keep the article purchased, unless it suited him, he should return it, if it does not suit him, at the earliest practicable moment.³ Where wheat is sold in stack, there is an implied warranty that it is merchantable.⁴

If an administrator takes upon himself to warrant personal property sold by him, the maker of a note given for such property may show a breach of the warranty, and consequent failure of consideration.⁵ Damages for a breach of warranty of chattels sold may be recovered in an independent suit, or they may be recouped or set off in an action on the contract of sale. And a notice of the defect, or an offer to return the property, is unnecessary in order to recover damages.⁶

Where diseased cattle are sold under a warranty of their healthiness, the measure of damages is the difference between the contract price and their value in their diseased condition, at the time of delivery, together with the amount of any other immediate damages resulting from the breach of warranty. And in a case where cattle were so sold, and the seller knew at the time that they were designed to be sent directly to New York, to be sold for beef, and they were so sent, it was held that expenses incurred on such of the cattle as died, or showed disease, before reaching New York, were immediate damages.⁷

A representation which is positive, and relates to a matter of fact, will constitute a warranty. But where the representation relates to that which is a matter of opinion or fancy, it is to be regarded as an expression of opinion rather than as such a statement of fact as will amount to a warranty, unless that

¹ *Babcock v. Trice*, 18 Ill. 420; *Misner v. Granger*, 4 Gilm. 69; Pars. Con. 465, 466.

² *Babcock v. Trice*, 18 Ill. 420; *Mears v. Nichols*, 41 Ill. 207; Chit. Cont. 401.

³ *Nichols v. Guibor*, 20 Ill. 285; *Douglass v. Gardner*, 10 Cush. 88.

⁴ *Fish v. Roseberry*, 22 Ill. 288.

⁵ *Welch v. Hoyt*, 24 Ill. 117.

⁶ *Crabtree v. Kile*, 21 Ill. 180; Chit. Cont. 362, 363.

⁷ *Crabtree v. Kile*, 21 Ill. 180.

idea is excluded by an express warranty, or such other declarations as leave no doubt of the intention to make a warranty.¹

Where a person selling a breast pin asserts positively that it is a diamond, such assertion amounts to a warranty.² A warranty of soundness in a horse or mule sold, amounts to a warranty against any defect which renders it not capable of immediate use.³

The additional recent Illinois cases noted below may be consulted on the subject of breach of warranty.⁴

No. 126. *Plea of breach of warranty, etc. (To declaration on promissory note, with common counts.)*

(*First plea non-assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed:*) that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action; and that heretofore, to wit, on etc., aforesaid, in consideration that the defendant would buy of the plaintiff, at his request, a certain boiler, at the price of — dollars, and would pay him the sum of — dollars, parcel of the said price, and would make and deliver to him the promissory note of the defendant for the residue thereof, payable to the order of the plaintiff — months after that day, the plaintiff promised him, the defendant, that the said boiler was then sound, and fit for the purpose of driving the machinery of a certain mill of the defendant; and there-

¹ *Towell v. Gatewood*, 2 Scam. 23; see *Roberts v. Applegate*, 153 Ill. 210.

² *Sparling v. Marks*, 86 Ill. 125; see *Ruff v. Jarrett*, 94 Ill. 475.

³ *Kenner v. Harding*, 85 Ill. 264; *Putt v. Duncan*, 2 Bradw. 461.

⁴ *Schoenberger v. McEwen*, 15 Bradw. 496; *Lunt v. Wrenn*, 113 Ill. 175; *Drennan v. Bunn*, 124 Ill. 183; *Ins. Co. v. Morgan*, 22 Ill. App. 198; *McCormick v. Snell*, 23 Ill. App. 79; *Rice v. Van Ackere*, 22 Ill. App. 588; *Becker v. Brawner*, 18 Ill. App. 39; *Siegel v. Brooke*, 25 Ill. App. 207; *Kingman v. Martin*, 24 Ill. App. 435; *H. P. D. Co. v. Schurlock*, 23 Ill. App. 426; *Gibbs v. Kaszezki*, 18 Ill. App. 623; *Tully v. Ex.*, 115 Ill. 545; *Cox v. Colles*, 17 Ill. App. 504; *Wilcox v. Carson*, 29 Ill. App. 72; *Underwood v. Wolf*, 131 Ill. 434; *Aultman*

v. Henderson, 32 Ill. App. 334; *Lake v. McRitchie*, 134 Ill. 207; *Hoover v. Doetsch*, 54 Ill. App. 65; *Roberts v. Applegate*, 153 Ill. 210; *Barnes v. Sisson*, 44 Ill. App. 327; *Mfg. Co. v. Saile*, 45 Ill. App. 562; *White v. Gresham*, 52 Ill. App. 399; *Aultman v. Weber*, 28 Ill. App. 94; *Titley v. Ent. S. Co.*, 127 Ill. 462; *Cook v. Travener*, 41 Ill. App. 644; *Brown v. Reinholdt*, 41 Ill. App. 602; *Wheeler v. Berkley*, 38 Ill. App. 519; *Keist v. Kingman*, 36 Ill. App. 493; *Henkins v. Miller*, 45 Ill. App. 34; *Aultman v. Johnson*, 45 Ill. App. 313; *Hodgman v. R. R. Co.*, 45 Ill. App. 395; *Ryan v. Miller*, 153 Ill. 138; *Gliddon v. Pooler*, 50 Ill. App. 36; *Wrightman v. Tucker*, 50 Ill. App. 75; *Edwards v. Dillon*, 147 Ill. 14.

upon the defendant, confiding in that promise, then and there bought of the plaintiff the said boiler, and, upon the sole consideration of the same promise and of the sale of the said boiler as aforesaid, paid to him the said sum of — dollars, parcel of the said price, and made and delivered to him the promissory note of the defendant for the residue thereof, as aforesaid, which is the same note in the said first count mentioned; yet the plaintiff did not regard his said promise, but thereby deceived and defrauded the defendant, in this, to wit, that the said boiler at the time of the making of the said promise of the plaintiff, was not sound, and fit for the purpose of driving the machinery of the said mill, but on the contrary thereof was then unsound, and unfit for that purpose, whereby the said boiler became and was of no use or value to the defendant; and by reason of the unsoundness and unfitness of the said boiler as aforesaid, the same afterwards, to wit, on etc., there burst and was destroyed, whereby the defendant suffered damage and loss of his property to the amount of — dollars. And this, etc. (*conclude with a verification, as in No. 85, ante.*)

PLEA OF WANT OR FAILURE OF CONSIDERATION.

The 9th section of chapter 98, in regard to Negotiable Instruments, provides, that

“In any action upon a note, bond, bill, or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions, if such instrument was made or entered into without a good and valuable consideration, or if the consideration upon which it was made or entered into has wholly or in part failed, it shall be lawful for the defendant to plead such want of consideration, or that the consideration has wholly or in part failed; and if it shall appear that such instrument was made or entered into without a good or valuable consideration, or that the consideration has wholly failed, the verdict shall be for the defendant; and if it shall appear that the consideration has failed in part, the plaintiff shall recover according to the equity of the case: *Provided*, that nothing in this section contained shall be construed to affect or impair the right of any *bona fide* assignee of any instrument made assignable by this act, when such assignment was made before such instrument became due.”¹

¹ 2 Starr & Curtis 1661; Rev. Stat. (1893), 994; Rev. Stat. (1895), 1062; see *Potter v. Gronbeck*, 117 Ill. 404; *Miller v. Larned*, 103 Ill. 562; *Allen v. Mason*, 17 Bradw. 318; *Lauferty*

v. Johnson, 17 Bradw. 549; *Jones v. Hubbard*, 17 Bradw. 564; *Mahon v. Gaither*, 59 Ill. App. 583; *Waite v. Kalwriskey*, 22 Ill. App. 382.

The statutory defenses of a want of consideration, or a total or partial failure thereof, are distinct defenses and must be separately and specially pleaded.¹ And under a plea of total failure, a partial failure can not be given in evidence.²

No. 127. Plea of want of consideration. (To declaration on promissory note, with common counts.)

(*First plea, non-assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed:*) that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action; and that the supposed promissory note in that count mentioned (*) was (*here set forth the facts attending the making of the note, and which show that it was without consideration—as that it was given for past forbearance, or for natural affection, etc.—and conclude thus:*) And so the defendant says, that the said supposed promissory note (*) was made without any good or valuable consideration. And this, etc. (*verification as in No. 85, ante.*)

If the note or other writing was given without any pretense or show of consideration, omit all between the asterisks in this form.³ The burden of proof, under this plea, is on the defendant.⁴ The want of sufficient or legal consideration for the contract, or illegality in the contract itself, may, it is said, be given in evidence under the general issue, in assumpsit, though it must be pleaded in debt on a specialty, or in covenant;⁵ but it would seem that in Illinois and Indiana a want of consideration must be specially pleaded in an action on a promissory note.⁶

¹ *Wadhams v. Swan*, 109 Ill. 46; *Wickersham v. Beers*, 20 Ill. App. 243; *Smith v. Munich*, 21 Ill. App. 323; *Belden v. Church*, 23 Ill. App. 473; *L. D. Co. v. Clapp*, 50 Ill. App. 301.

² *Swain v. Carwood*, 2 Scam. 505; *Sims v. Klein*, Breese 302; *Johnson v. Wilson*, 54 Ill. 419; *Wadhams v. Swan*, 109 Ill. 46; *Lumley v. Golden*, 15 Bradw. 462.

³ See *Poole v. Vanlandingham*, Breese, 47, note 2; *Sheldon v. Lewis*, 97 Ill. 640; *Booth v. Wiley*, 102 Ill. 84.

⁴ *Stacker v. Watson*, 1 Scam. 207; *McFarland v. Williams*, 107 Ill. 33; *Grier v. Puterbaugh*, 108 Ill. 602; *Wheat v. Summers*, 13 Bradw. 444; *Wickersham v. Beers*, 20 Bradw. 243; *McCartney v. Washburn*, 52 Ill. App. 540.

⁵ 1 Chit. Pl. 417-428; *Wineman v. Oberne*, 40 Ill. App. 270; *Wilson v. King*, 83 Ill. 232.

⁶ See *Stacker v. Watson*, 1 Scam. 207; *Buckmaster v. Grundy*, 1 Scam. 310; *Henderson v. Palmer*, 71 Ill. 579; *Tenney v. Foote*, 95 Ill. 99; *Patton v. Stewart*, 78 Ill. 481.

A note given for past forbearance of a debt is without consideration;¹ and natural affection is not a valid consideration for a note, or other executory contract.² It is a good plea to an action on a promissory note, that the consideration was a lease which was null and void.³

Where A's house was burned by accident, and the fire extended, and burned the house of B., and the latter, by falsely representing that he could prove the fire to have been caused by the negligence or misconduct of A., induced him to give his promissory note for a part of the amount of the loss, the note was held to have been given without consideration.⁴

A promissory note may be given upon different distinct and independent considerations, and if one consideration is valid and the other not, there may be a recovery *pro tanto* so far as it is founded on a valid consideration.⁵ A quit-claim deed is a sufficient consideration for a promissory note.⁶

A note given as collateral security for a pre-existing debt is founded upon a valid consideration.⁷

No. 128. *Plea of total failure of consideration—breach of warranty. (To declaration on promissory note, with common counts.)*

(First plea, non assumpsit, as ante No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed:) that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action; and that on, etc., aforesaid, the plaintiff there sold to the defendant a certain boiler, at the price of — dollars, and warranted the said boiler to be then sound, and fit for the purpose of driving the machinery of a certain mill of the defendant; and that thereupon the defendant, upon the sole consideration of the said sale and warranty of the said boiler as aforesaid, then and there paid to the plaintiff the sum of — dollars,

¹ *Carter v. Moses*, 39 Ill. 539; *Mulholland v. Bartlett*, 74 Ill. 58; *Edleman v. Byers*, 75 Ill. 367; *Thayer v. Allison*, 109 Ill. 180; *Parker v. Enslow*, 102 Ill. 272; *Henderson v. Palmer*, 71 Ill. 580.

² *Kirkpatrick v. Taylor*, 43 Ill. 207; *Forbes v. Williams*, 13 Bradw. 280; *Padfield v. Padfield*, 68 Ill. 210; *Pratt v. Trustees*, 93 Ill. 475; *Williams v. Forbes*, 114 Ill. 167.

³ *Kinzie v. Chicago*, 2 Scam. 187;

Ry. Co. v. Mathers, 104 Ill. 257; *Reeves v. Hyde*, 14 Bradw. 233.

⁴ *Knotts v. Preble*, 50 Ill. 226.

⁵ *Parish v. Stone*, 14 Pick. 198; *Forbes v. Williams*, 13 Ill. App. 280; *Graves v. Safford*, 41 Ill. App. 659.

⁶ *Bonney v. Smith*, 17 Ill. 531; *Sheldon v. Harding*, 44 Ill. 68.

⁷ *Hancock v. Hodgson*, 3 Scam. 329; *Blackwood v. Bowen*, 43 Ill. App. 320.

parcel of the price aforesaid, and made and delivered to him the promissory note in the said first count mentioned, to secure the payment of the residue of the said price; and that the said boiler, at the time of the said sale and warranty thereof as aforesaid, was not sound and fit for the purpose of driving the machinery of the said mill, but on the contrary thereof was then unsound, and unfit for that purpose, whereby the said boiler became and was of no use or value to the defendant; *and that by reason of the unsoundness and unfitness of the said boiler, as aforesaid, the same afterward, to wit, on, etc., there burst, and was thereby destroyed*: And so the defendant says that the consideration upon which the said note was made has wholly failed. And this, etc. (*conclude with a verification, as in No. 85, ante.*)

No. 129. Plea of total failure of consideration—breach of warranty of a horse. (To declaration on promissory note, with common counts.)

First plea, non assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk and then proceed:) that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action: and that on, etc., aforesaid, the plaintiff there sold to the defendant a certain horse, at the price of — dollars, and warranted the said horse to be then sound; and that thereupon the defendant, upon the sole consideration of the said sale and warranty of the said horse, aforesaid, then and there made and delivered to the plaintiff the promissory note in the said first count mentioned, to secure the payment of the said sum of — dollars; and that the said horse, at the time of the said sale and warranty thereof, as aforesaid, was not sound, but on the contrary thereof was then unsound (*) *and affected with disease*, whereby the said horse became and was of no use or value to the defendant, *and of the same disease afterwards died*: And so the defendant says, that the consideration upon which the said note was made has wholly failed. And this, etc., (*conclude with a verification as in No. 85, ante.*)

The plaintiff may reply that the horse was sound, and free from disease, or deny the warranty. The plea of failure of consideration, setting up a breach of a warranty of soundness, should state the breach co-extensively with the contract of warranty. It must negative the words of the contract. The particular unsoundness need not be stated.¹

A plea of failure of consideration to an action upon a note should state particularly in what the failure consisted. General allegations are not sufficient.² In pleading a total failure

¹ *Leeper v. Shawman*, 12 Ind. 463;
2 Saund. Pl. & Ev., 1226; 1 Chit. Pl.,
291; 9 Co. 60, b.

² *Taylor v. Sprinkle*, Breese 17;
Cornelius v. Vanorsdall, Breese 23;
Poole v. Vanlandingham, Breese 47;

of consideration, the plea should set forth every distinct element entering into the consideration, and then as distinctly aver a failure of each and all the parts of it.¹

A partial failure of consideration can not be given in evidence under the general issue and a notice of set-off,² or under a notice or plea of total failure of consideration.³ Mere inadequacy of consideration is no ground for impeaching a contract.⁴ Parol evidence may be received to impeach the consideration of a note, but not to vary its terms.⁵ A general plea of failure of consideration is bad.⁶

No. 130. Plea of total failure of consideration of note given for fees.

(*First plea, non assumpsit, as ante, No. 82.*) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, (or *actio non*) because he says that the sole and only consideration of the said promissory note, in the said declaration mentioned, was an agreement entered into by the plaintiff with the defendant relating to his fees in a murder case pending in the state of Missouri; that before and at the time of the execution and delivery of said note to the plaintiff, the plaintiff had been and was the attorney for one G. H. in said prosecution for murder, and had then already earned some fees therein; and the defendant then and there being desirous that the plaintiff should not make any charge against the said G. H. for his legal services already performed, or that he might in the future perform therein, it was agreed between the defendant and the plaintiff, that if the defendant would give the plaintiff the said promissory note for the sum of — dollars, for his fees in said cause, he, the plaintiff, would never make any charge or claim against the said G. H. for his services in said cause; that in consideration of this agreement on the part of the plaintiff, and for no other consideration whatever, the defendant executed and delivered the promissory note in suit to the plaintiff; and the

Bradshaw v. Newman, Breese 133; *Sims v. Klein*, Breese 302; *Parks v. Holmes*, 22 Ill. 522; *Kinney v. Turner*, 15 Ill. 181; *Christopher v. Cheney*, 64 Ill. 26; *Honeyman v. Jarvis*, 64 Ill. 366; *Corwith v. Colter*, 82 Ill. 585.

¹ *Kinney v. Turner*, 15 Ill. 182; *Wilson v. King*, 83 Ill. 232; *Sheldon v. Lewis*, 97 Ill. 640.

² *Swain v. Cawood*, 2 Scam. 505; *Sheldon v. Lewis*, 97 Ill. 640.

³ *Swain v. Cawood*, 2 Scam. 505; *Sims v. Klein*, Breese 302; *Burnap*

v. Cook, 32 Ill. 168; *Johnson v. Wilson*, 54 Ill. 419.

⁴ *Major v. Brush*, 7 Ind. 232; *Vest v. Weir*, 4 Blackf. 135.

⁵ *Penny v. Graves*, 12 Ill. 287; *Gage v. Lewis*, 68 Ill. 604; *Morris v. Tillson*, 81 Ill. 607; *Ruff v. Jarrett*, 94 Ill. 475; *Mann v. Smyser*, 76 Ill. 365; *Broadwell v. Sanderson*, 29 Ill. App. 384; *Kidder v. Vandersloot*, 114 Ill. 136; *Martin v. Stubbings*, 27 Ill. App. 121.

⁶ *Applegate v. Crawford*, 2 Carter (Ind.) 579.

defendant further avers, that after the maturity of said note, the plaintiff, in violation of said agreement, brought suit against the said G. H. for the sum of — dollars, for his fees in the said murder case; that afterwards the said suit of the plaintiff against the said G. H. was settled and compromised for the sum of — dollars, paid by the said G. H. to the plaintiff, in full satisfaction and discharge of his fees as aforesaid; and so the defendant says, that the consideration upon which the said note was executed, has wholly failed; and this the defendant is ready to verify; wherefore he prays judgment, etc.

G. H., Att'y for Def't.

No. 131. Plea of total failure of consideration—to action by assignee of promissory note given on purchase of real estate. (Count on note and common counts.)

(*First plea, non assumpsit, as ante, No. 82; second plea as ante, No. 85, to the asterisk, and then proceed:*) that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action; and that the promissory note in that count mentioned was assigned to the plaintiff after the same became due; and that the consideration upon the said note was made has wholly failed. And the defendant further in fact says, that before the making of the said note, to wit, on, etc., aforesaid, the said E. F. (*the payee*) there agreed with the defendant to sell to him, at the price of — dollars, and to convey to him in fee simple, by deed with covenants of warranty, a certain parcel of land, to wit, (*here describe the land;*) and thereupon the said E. F., on the day aforesaid, there made and delivered to the defendant a deed purporting to be a deed of conveyance of the said parcel of land, in fee simple, (which said deed, bearing date the day aforesaid, is now to the court here shown,) and thereby covenanted with the defendant, *among other things*, that (*here set out such of the covenants as may be desired, for example as follows—*) he the said E. F. was then well seized of the said parcel of land, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple, and then had good right, full power and lawful authority to grant, bargain, sell and convey the same in fee simple, as aforesaid; as by the said deed, reference being thereto had, will more fully appear; and thereupon the defendant, to secure the payment of a part of the said price, and upon the sole consideration of the sale and conveyance so agreed and purported to be made of the said parcel of land as aforesaid, and of the said covenants in the said deed contained, then and there made and delivered the said note to the said E. F. And the defendant further says, that at the time of the making and delivery of the said deed the said E. F. was not well seized of the said parcel of land, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple, nor had he then good right, full power and lawful authority to grant, bargain, sell and convey the same as aforesaid, but on the contrary thereof the said E. F. did not then have, nor has he since acquired, any right or title whatsoever to the said parcel of land, or any part thereof; by means whereof (*here set forth an eviction, under*

paramount title, if such has been the fact, or allege as follows—) the defendant has not had, nor has, the possession or enjoyment of the said parcel of land, or any part thereof. And this, etc. (*conclude with a verification, as in No. 85, ante.*)

The plaintiff may reply that the note was not indorsed after maturity;¹ or that the consideration was not as alleged in the plea, or that the title to the land has not failed. If deemed essential to put in issue more than one of the allegations of the plea, the plaintiff may, by leave of the court, reply several replications.

To a plea that the plaintiff does not own a certain title to land, and consequently can not convey it as agreed, it seems that he may reply that he owns the title in equity, and can control it for the benefit of the purchaser.²

Where the consideration of a note is an agreement to convey lands, and at the time fixed for the conveyance the vendor has no title to the lands, and consequently can not convey them, there is such a failure of consideration as will bar a recovery on the note.³

The title to the land, whatever the covenantor professes to have, is the true consideration of the note given for the purchase money thereof, and not the covenants in the deed.⁴ It is a sufficient defense to an action on a note, to show a breach of a covenant of warranty in a deed for the conveyance of lands, for the price of which the note was given.⁵ But a purchaser of land, receiving a deed with covenants of title, can not avoid the payment of promissory notes given for the pur-

¹ See *Ebersole v. Bank*, 36 Ill. App. 267.

² *Runkle v. Johnson*, 30 Ill. 328.

³ *Elston v. Blanchard*, 2 Scam. 420; *Tyler v. Young*, 2 Scam. 444; *Myers v. Aikman*, 2 Scam. 452; *Gregory v. Scott*, 4 Scam. 392; *Davis v. McVicker*, 11 Ill. 327; *Lull v. Stone*, 37 Ill. 224; see *Bailey v. Cromwell*, 3 Scam. 72; *Wagy v. Lane*, 3 Scam. 237; *Sargeant v. Kellogg*, 5 Giln. 273; *Foster v. Jared*, 12 Ill. 451; *Vining v. Leeman*, 45 Ill. 246.

⁴ *Tyler v. Young*, 2 Scam. 444; *Owings v. Thompson*, 3 Scam. 502; *Mason v. Wait*, 4 Scam. 127; *Gregory v. Scott*, 4 Scam. 393; *Furness v. Williams*, 11 Ill. 229; *Conway v. Case*, 22 Ill. 127; see *Miller v. Howell*, 1 Scam. 499; *Schuchmann v. Knoebel*, 27 Ill. 175; *Runkle v. Johnson*, 30 Ill. 328; *Willets v. Burgess*, 34 Ill. 494.

⁵ *Slack v. McLagan*, 15 Ill. 242; *Watts v. Parker*, 27 Ill. 226; *Christy v. Ogle*, 33 Ill. 295; *Laforge v. Matthews*, 68 Ill. 328.

chase money on the ground that the grantor had no title, if the possession of the purchaser has not been disturbed nor the paramount title asserted.¹

Where there is neither fraud nor warranty on the part of the vendor in a sale of land, the vendee can not recover the purchase money paid, although there may be a total failure of title.² In an action on a note given on a purchase of land the defendant may recoup an amount he has been compelled to pay in order to remove an incumbrance on the land.³ For cases where total or partial failure of consideration was pleaded—the consideration being the title to real estate—see the cases reported in 4 Scam. 392, 561; 22 Ill. 127; 27 Ill. 175; 34 Ill. 494; and 45 Ill. 246.

No. 132. Plea of partial failure of consideration. (To declaration on promissory note, with common counts.)

(*First plea, non-assumpsit, as ante, No. 82.*) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, except as to the sum of ——— dollars, because he says (*proceed as in No. 129, ante, to the asterisk, and thence as follows:*) and so has continued from thence hitherto, by reason whereof the said horse was not nor is of any greater value than the said sum of ——— dollars: And so the defendant says, that the consideration upon which the said note was made has failed except as to that sum of money. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action, except as to the said sum of ——— dollars.

A partial failure of consideration may be pleaded to a promissory note given for the purchase of land.⁴ A plea which commences as a plea of partial failure of consideration (which goes only to a part of the action,) and concludes as a plea of fraud (which is a defense to the whole action,) is bad.⁵

See further, as to consideration, and want or failure thereof, the additional Illinois cases noted below.⁶

¹ *Vining v. Leeman*, 45 Ill. 246; see *Linton v. Porter*, 31 Ill. 107.

² *Doyle v. Knapp*, 3 Scam. 334; see *Bertrand v. Morrison*, Breese 227; *Merriwether v. Smith*, 2 Scam. 31; *Furness v. Williams*, 11 Ill. 229; *Willets v. Burgess*, 34 Ill. 494.

³ *Schuchmann v. Knoebel*, 27 Ill. 175.

⁴ *Schuchmann v. Knoebel*, 27 Ill. 175; *Webster v. Vickers*, 2 Scam. 295; see *Willets v. Burgess*, 34 Ill. 494.

⁵ *Sims v. Klein*, Breese 302.

⁶ *Wood v. Hynes*, 1 Scam. 103;

PLEA OF ILLEGAL CONSIDERATION.

By the statute of Illinois, all promises, notes, etc., for the payment of money or property won at play are void absolutely; and no assignment of any such note, etc., affects the defense of the person who has given the same.¹

Illegality in the contract itself—as gaming, etc.—may, it seems, be given in evidence under the general issue in assumpsit, or debt on simple contract, but in actions on specialties it must be pleaded.² On the subject of gaming contracts the additional Illinois cases given in the note may be consulted.³

Stalker v. Hewitt, 1 Scam. 207; *Hancock v. Hodgson*, 3 Scam. 329; *Conkling v. Underhill*, 3 Scam. 388; *Bradley v. Case*, 3 Scam. 585; *Barger v. Jones*, 3 Scam. 613; *Hall v. Perkins*, 4 Scam. 548; *Mason v. Caldwell*, 5 Gilm. 196; *Walter v. Kirk*, 14 Ill. 55; *Harlow v. Boswell*, 15 Ill. 56; *Myers v. Turner*, 17 Ill. 179; *Bonney v. Smith*, 17 Ill. 531; *Sigsworth v. Coulter*, 18 Ill. 204; *Buntain v. Dutton*, 21 Ill. 190; *Young v. Ward*, 21 Ill. 223; *Stephens v. Thornton*, 26 Ill. 328; *McHenry v. Yokum*, 27 Ill. 160; *Kerney v. Gardner*, 27 Ill. 163; *Buntain v. Dutton*, 21 Ill. 190; *Watt v. Parker*, 27 Ill. 226; *Hill v. Todd*, 29 Ill. 101; *Hoyt v. Jaffrey*, 29 Ill. 104; *Conkling v. Vail*, 31 Ill. 166; *Cassell v. Ross*, 33 Ill. 244; *Stafford v. Fargo*, 35 Ill. 481; *Newell v. County*, 37 Ill. 253; *Howell v. Edmunds*, 47 Ill. 79; *Austin v. Bainter*, 50 Ill. 308; *Bothwell v. Brown*, 51 Ill. 234; *Hennessey v. Hill*, 52 Ill. 281; *Townsend v. Comm.*, 63 Ill. 26; *Richards v. Betzer*, 53 Ill. 467; *Gates v. Hoeckethal*, 57 Ill. 534; *Tuttle v. Ridgway*, 62 Ill. 515; *Ins. Co. v. Smith*, 63 Ill. 187; *Davenport v. Springer*, 63 Ill. 276; *Kirkham v. Boston*, 67 Ill. 599; *Padfield v. Padfield*, 68 Ill. 210; *Ball v. Benjamin*, 73 Ill. 39; *Knight v. Hulbert*, 74 Ill. 133; *Best v. Bank*, 76 Ill. 608; *Win-*

kelman v. Choteau, 78 Ill. 107; *Harms v. Anfield*, 79 Ill. 257; *Werner v. Fries*, 85 Ill. 356; *Chetlain v. Ins. Co.*, 86 Ill. 220; *Silverman v. Chase*, 90 Ill. 37; *U. T. Co. v. Rigdon*, 93 Ill. 458; *Drennan v. Bunn*, 124 Ill. 175; *Price v. Bank*, 124 Ill. 317; *Hodges v. Nash*, 141 Ill. 391; *Richardson v. Richardson*, 148 Ill. 563; *Cothran v. Ellis*, 125 Ill. 498; *Hardy v. Ross*, 4 Bradw. 501; *McIntyre v. Robinson*, 8 Bradw. 115; *Forbes v. Williams*, 13 Bradw. 280; *Martin v. Stubbings*, 20 Ill. App. 381; *Wheeler v. Wheeler*, 28 Ill. App. 385; *Frolich v. Alexander*, 36 Ill. 428; *Ins. Co. v. Still*, 43 Ill. App. 233; *Crofut v. Aldrich*, 54 Ill. App. 541.

¹ 1 Starr & Curtis, 792; Rev. Stat. (1893), 492; Rev. Stat. (1895), 534; *Chapin v. Drake*, 57 Ill. 296; *Bank v. Van Kirk*, 39 Ill. App. 23; *Trust Co. v. Goodrich*, 75 Ill. 554; *Holland v. Swain*, 94 Ill. 154; *Abrams v. Camp*, 3 Scam. 290; *Williams v. Judy*, 3 Gilm. 282; *Pearce v. Foote*, 113 Ill. 228; *Pope v. Hanke*, 52 Ill. App. 453.

² 1 Chit. Pl. 417, 421, 425; see *Beadles v. Bliss*, 27 Ill. 320.

³ *Lurton v. Gilliam*, 1 Scam. 577; *Adams v. Woldridge*, 3 Scam. 253; *Morgan v. Pettit*, 3 Scam. 529; *Nash v. Monheimer*, 20 Ill. 215; *Smith v. Smith*, 21 Ill. 244; *Gordon v.*

If any part of the entire consideration of a contract or any part of an entire promise be illegal, whether by statute or at common law, the whole contract is void.¹

A note signed by one as surety upon the promise that the maker thereof shall not be prosecuted for embezzlement, being based upon an illegal consideration, is void.² See the observations under the precedents of pleas of payment, accord and satisfaction, etc., *ante*, in regard to adapting the plea to the different forms of action.

No. 133. Plea that promises were for money won by gaming.

(*First plea, non-assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed :*) that the several supposed promises in the said declaration mentioned were, and each of them was, made upon the consideration of money won by the plaintiff from the defendant by gaming, to wit, by playing at certain games with cards; wherefore, by force of the statute, etc., the said supposed promises were and are wholly void. And this, etc. (*conclude with a verification, as in No. 85, ante*).

(The plaintiff may reply that the promises were made upon good and lawful consideration, and not upon the supposed unlawful consideration mentioned in the plea. See the replication to the plea of usury, No. 104, *ante*.)

*No. 134. Replication to a plea that note was for money won at play.*³

(*Venue and title of cause*.)

And the plaintiff as to the said plea of the defendant, by him — above pleaded, says *precludi non*, because he says, that the said promissory note was made and delivered to him by the defendant for the sum of money therein mentioned, and which was *bona fide* due and owing to him by the defendant, and not for money won, etc. (*negative the plea*). And this he prays may be inquired of by the country, etc.

E. F., Att'y for Pl'ff.

No. 135. Plea of illegal consideration—Gambling in grain.

(*Commence as in No. 85, ante, to the (*) and then proceed:*) that the several supposed causes of action in the said declaration mentioned are one

Casey, 23 Ill. 70; *Totman v. Strader*, 23 Ill. 493; *Stevens v. Sharp*, 26 Ill. 404; *Beadles v. Bliss*, 27 Ill. 320; *McClurken v. Detrich*, 33 Ill. 349; *Grayman v. Burlingame*, 36 Ill. 201; *Mosher v. Griffin*, 51 Ill. 184; *Garrison v. McGregor*, 51 Ill. 473.

Henderson v. Palmer, 71 Ill. 579; *Miles v. Andrews*, 40 Ill. App. 164.

² *Henderson v. Palmer*, 71 Ill. 579; *Gorham v. Keyes*, 137 Mass. 583; *Rouse v. Mohr*, 29 Ill. App. 326.

³ *Riedle v. Mulhauser*, 20 Ill. App. 68; 2 D. & E. 439.

¹ *Nash v. Monheimer*, 20 Ill. 215;

and the same, to wit, the supposed cause of action in the first count mentioned, and not different causes of action; that the sole and only consideration upon which the said promissory note in the said count mentioned was executed, was for money won by the plaintiff from the defendant in speculating on the market price of grain, to wit, by buying and selling deals and options in grain; that in each and all of said deals and options it was understood and intended by both the plaintiff and defendant, that neither party was to receive or deliver the grain so bought or sold; and that the loss or gain resulting from such transactions should be settled by the payment or receipt of the difference between the price agreed upon and the market value of the same at the time appointed for the delivery thereof. Wherefore, by force of the statute in such case provided, the said promissory note is wholly void; wherefore, the defendant prays judgment, etc.

The intent of the statute (sec. 130, chap. 38) is to prohibit all dealings in options in grain or other commodities. The statute should be justly and fairly construed to enable it to accomplish this end, and not to defeat it.¹

PLEA OF DISCHARGE IN BANKRUPTCY.

The bankrupt law provides that a discharge in bankruptcy may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting the same forth *in hæc verba*; and the certificate shall be conclusive evidence, in favor of such bankrupt, of the fact and the regularity of such discharge.² It was not intended by any of the provisions of the bankrupt law that the bankrupt courts should pass, in a plenary manner, upon the question whether a particular claim will or will not be released by a discharge. That inquiry is one properly to be made only by the court in which a direct suit on the debt is pending. When the dis-

¹ *Pearce v. Foote*, 113 Ill. 228; *McCormick v. Nichols*, 19 Bradw. 334; *Coffman v. Young*, 20 Bradw. 76; *Miller v. Bensley*, 20 Bradw. 528; *Larned v. Tiernon*, 110 Ill. 173; *English v. Cannon*, 17 Bradw. 475; *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33; *Tenney v. Foote*, 4 Bradw. 594; *Webster v. Sturges*, 7 Bradw. 560; *Bank v. Spaid*, 8 Bradw. 493; *Doe v. Spaid*, 8 Bradw. 549; *Kreigh v. Sherman*, 105 Ill. 49; *Tenney v.*

Foote, 95 Ill. 99; *Brand v. Henderson*, 107 Ill. 141; *Penn v. Bornman*, 102 Ill. 523; *Powell v. McCord*, 121 Ill. 333; *Cothran v. Ellis*, 125 Ill. 496; *Schneider v. Turner*, 130 Ill. 28; *Benson v. Morgan*, 26 Ill. App. 22; *Wheeler v. McDermid*, 36 Ill. App. 179; *Bank v. Vankirk*, 39 Ill. App. 23; *Dillon v. McCrea*, 59 Ill. App. 505.

² Sec. 34, Bankrupt Law of 1867; see *Ry. Co. v. Jenkins*, 103 Ill. 588.

charge is pleaded, the question of the extent of its operation upon the debts of the bankrupt, and whether a particular debt is or is not discharged by it, comes up for determination by the court in which it is pleaded, and the determination will be a binding judgment between the parties.¹

A discharge duly granted, when pleaded in bar to the further maintenance of an action for a prior debt, can not be impeached in a state court for any cause which would have prevented the granting of it under section 29, or would have been sufficient ground for annulling it under section 34 of the bankrupt law.² Section 33 of the bankrupt law provides "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act."³ No debt contracted by fraud can be discharged, even though the debt is merged in a judgment.⁴ Where the record of the action shows a material and traversable allegation of fraud as its sole foundation the debt or demand may fairly be said to be one founded in fraud, and is not merged by a judgment thereon.⁵

A claim is not discharged which is founded on a deceit by means of false and fraudulent representations and inducements whereby the bankrupt procured from the plaintiff an assignment of a complete stock in trade, including goods, choses in action, etc., in exchange for a note of much less value than was represented, if not wholly worthless.⁶ The act, from its language, seems to have been intentionally made so broad as to include a debt created by a defalcation of the bankrupt while acting in any fiduciary capacity whatever, and not to be confined to any special fiduciary capacity.⁷ A claim against a person for withholding the proceeds arising from the sale of

¹ Bump's Law of Bankr. 395; 36 How. Pr. R. 167.

² *Bates v. West*, 19 Ill. 134; Bump's Law of Bankr. 396; *Bailey v. Moore*, 21 Ill. 165.

³ Bump's Law of Bankr. 391; *Allen v. Hickling*, 11 Brad. 549; see *Ames v. Moir*, 130 Ill. 582.

⁴ See *Katz v. Moesinger*, 110 Ill. 372; *St. John v. Stevenson*, 90 Ill. 82.

⁵ Bump's Law of Bankr. 392.

⁶ Bump, 392; 2 B. R. 11; 1 L. T. B. 90.

⁷ B. R. Sup. 7; S. C., 1 Bt. 248; Bump, 392.

goods consigned to him to be sold on commission, is a debt contracted by him in a fiduciary capacity.¹

A discharge in bankruptcy, like the statute of limitations, does not annul the original debt or liability of the bankrupt, but merely suspends the right of action for its recovery. It therefore follows that no one but the bankrupt can plead his discharge in avoidance of his liability. He may, if he chooses, treat his covenants and obligations as still binding upon him.²

A judgment obtained against a bankrupt in the state court pending a proceeding by him in the United States court for a discharge in bankruptcy is valid, notwithstanding his subsequent discharge. The bankrupt, after his discharge, may apply for and have a stay of the execution of the judgment.³ A discharged debt of a bankrupt may be revived by an absolute or conditional promise, but it must be clear, distinct and unequivocal.⁴ The subsequent promise need not have been made after the discharge but it is sufficient if it is made after the petition in bankruptcy is filed.⁵

(In debt on simple contract, the word *contracts* may be substituted for *promises*; and in actions on specialties say "the writing," or "the supposed writing obligatory," instead of "the several supposed promises.")

No. 136. *Plea of discharge in bankruptcy.*

(*First plea, non-assumpsit, as ante, No. 82; second plea as in No. 85, ante, to the asterisk, and then proceed:*) that after the making the several supposed promises in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc., the district court of the United States of America for the — district of — granted to the defendant a certain discharge, in these words and figures, to wit: (*Here set forth the discharge, in hæc verba.*) And the defendant further says, that the several supposed causes of action in the said declaration mentioned are in respect of debts and claims, and each of them is in respect of a debt and claim by the said act of congress made provable against the estate of the defendant, and which existed on the said — day of —; and that the said supposed causes of action are not, nor are any nor is any one of them, in respect of

¹ 2 B. R. 74, 114; S. C., 2 Bt. 554;
S. C., 6 Blatch. 292.

² *Pease v. Ritch*, 132 Ill. 638;
Bush v. Stanley, 122 Ill. 406.

³ *Lackey v. Steere*, 121 Ill. 598.

⁴ *St. John v. Stevenson*, 90 Ill. 82;
Cheney v. Barge, 26 Ill. App. 182.

⁵ *Cheney v. Barge*, 26 Ill. App.
182; *Wheeler v. Wheeler*, 28 Ill. App.
385.

any such debts or debt as are or is by the said act excepted from the operation of a discharge in bankruptcy. And this, etc. (*conclude with a verification, as in No. 85, ante.*)

PLEA DENYING EXECUTION OF WRITTEN CONTRACTS.

The 33d section of the Illinois Practice Act provides that "no person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit; and if plaintiff, shall file his affidavit denying the execution or assignment of such instrument; *provided*, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party."¹ This section controls United States circuit courts in Illinois.²

In assumpsit, when the execution of the instrument sued on is sought to be put in issue, the proper plea is *non assumpsit*, verified by affidavit;³ and in debt on a specialty, and covenant, the proper plea is *non est factum*, verified in like manner.⁴ The affidavit is not, however, competent evidence upon the issue as to the execution and delivery of the instrument.⁵ In debt on simple contract in writing, the following form may be used, and it will answer in any action at law on a written instrument.

No. 137. *Plea denying execution of instrument.*

(*As in No. 85, ante, to the asterisk, and then proceed:*) that he did not make and deliver the writing in the said declaration mentioned, in manner

¹ 2 Starr & Curtis 1797; Rev. Stat. (1893), 1075; Rev. Stat. (1895), 1159; see *Bailey v. Bank*, 127 Ill. 332.

² *R. R. Co. v. Knight*, 122 U. S. 76.

³ *Baird v. Best*, 13 Bradw. 385; *Martin v. Culver*, 87 Ill. 49; *Hitchcock v. Buchanan*, 105 U. S. 416; *Hinton v. Husbands*, 3 Scam. 187; *Ry. Co. v. Neill*, 16 Ill. 269; see *Vance v. Funk*, 2 Scam. 263; *Gardi-*

ner v. Harback, 21 Ill. 129; *Home F. Co. v. Beebe*, 48 Ill. 138; *Williams v. Pow. Co.*, 36 Ill. App. 107; *Murchie v. Peck*, 57 Ill. App. 396; *Bailey v. Bank*, 21 Ill. App. 642.

⁴ *Longley v. Norvall*, 1 Scam. 389; *Witter v. McNeill*, 3 Scam. 433; *Mia v. People*, 92 Ill. 549.

⁵ *Hunter v. Harris*, 131 Ill. 482.

and form as the plaintiff has above in that behalf alleged: And of this the defendant puts himself upon the country, etc.

In the — — Court.

C. D.	} <i>Assumpsit.</i>	
<i>ats.</i>		
A. B.		The said C. D., defendant, makes oath and says, (*) that the foregoing plea is true in substance and in fact.

C. D.

Subscribed and sworn, etc.

Where a firm name is improperly used for the private purposes of one of the partners, the proper practice would be for the other to file a plea denying the execution of the instrument, verified by affidavit.¹ The affidavit must be made by the person pleading the plea; and if it is pleaded by several persons, they must all verify it. If verified by but one, the plaintiff has to prove his case as to that one only.²

If the person denying the execution or assignment of an instrument is not the person alleged to have made or assigned the same, the words "upon his information and belief" are to be inserted in the affidavit, where the asterisk is placed in the above form. Replications and rejoinders, denying the execution of written contracts pleaded or replied, can be framed from the above form of plea; or *non est factum* can be replied or rejoined, when the execution of a specialty is to be denied.

See the additional Illinois cases noted below,³ and those noted under the next two forms.

¹ *Zuel v. Bowen*, 78 Ill. 234; see *Davis v. Scarritt*, 17 Ill. 202; *Stillson v. Hill*, 18 Ill. 262; *Smith v. Knight*, 71 Ill. 148; *Spurck v. Leonard*, 9 Bradw. 174.

² *Stevenson v. Farnsworth*, 2 Gilm. 715; *Kennedy v. Hall*, 68 Ill. 165; *King v. Haines*, 23 Ill. 340; *Bailey v. Bank*, 21 Ill. App. 642.

³ *Linn v. Buckingham*, 1 Scam. 451; *Delahay v. Clement*, 2 Scam. 575; *Archer v. Bogue*, 3 Scam. 526; *Dwight v. Newell*, 15 Ill. 333; *Frye*

v. Menkins, 15 Ill. 339; *Adams v. King*, 16 Ill. 169; *Martin v. Culver*, 87 Ill. 49; *Wallace v. Wallace*, 8 Bradw. 69; *Baird v. Best*, 13 Bradw. 385; *Shufeldt v. Henderson*, 26 Ill. App. 593; *Renting Co. v. Hutchinson*, 25 Ill. App. 476; *Aultman v. Henderson*, 32 Ill. App. 331; *Donnell v. McDonald*, 37 Ill. App. 144; *Judd v. Cradle*, 37 Ill. App. 149; *Gidding v. McCumber*, 51 Ill. App. 373; *Crawford v. Crane*, 61 Ill. App. 459.

PLEA DENYING JOINT LIABILITY.

Section 35 of the Illinois Practice Act is as follows: "In actions upon contracts, express or implied, against two or more defendants, as partners or joint obligors or payors, *whether so alleged or not*, proof of the joint liability of the defendants or partnership of the defendants, or their christian or surnames, shall not in the first instance be required, to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea *in bar, denying the partnership, or joint liability*, or the execution of the instrument sued upon, verified by affidavit."¹ This differs, in the respects indicated by the words in italics, from the law as it existed before July 1, 1872.

No. 138. Plea by one defendant, denying joint liability.

(See form No. 85, ante, as to commencement—) the said E. F. says that the plaintiff ought not to have his aforesaid action against him, the said E. F., because he says, that he is not nor ever was jointly liable with the said C. D. in respect of the several supposed causes of action in the said declaration mentioned, or any or either of them, in manner and form as the plaintiff has above in that behalf alleged: And of this he, the said E. F., puts himself upon the country, etc. (*Add affidavit, as in last precedent.*)

139. Plea denying joint liability.

(As in No. 85, ante, to the asterisk, and then proceed :) that they are not nor ever were jointly liable in respect of the several supposed causes of action in the said declaration mentioned, or any or either of them, in manner and form as the plaintiff has above in that behalf alleged: And of this the defendants put themselves upon the country, etc. (*Add affidavit as in No. 137, ante.*)

In a case under the former law, the court said that where several defendants, sued on an instrument in writing, denied the execution of the instrument, by plea verified by affidavit, such plea also put in issue the joint liability; but that if the writing was not denied, or the action was not on a writing, then the joint liability could only be put in issue by plea

¹ 2 Starr & Curtis 1800; Rev. Stat. (1893), 1075; Rev. Stat. (1895), 1159; *Goodenow v. Jones*, 75 Ill. 48; *Rosenberg v. Barrett*, 2 Bradw. 386; *Zuel v. Bowen*, 78 Ill. 234; *Smith v. Knight*, 71 Ill. 148.

in abatement.¹ In another case, however, which was an action on a promissory note, where one of the defendants pleaded *non assumpsit*, verified by affidavit, it was said that this did not put in issue the joint liability, which could only be done by plea in abatement;² and the same thing was said, as to the necessity of a plea in abatement, in another case (which was not, however, an action on a writing), where *non assumpsit*, verified by affidavit, was pleaded by one of two defendants.³

Where several persons are sued as joint makers of a promissory note, the production of a note signed at the foot by two of the defendants, the name of the other appearing on the back, will, *prima facie*, support the declaration; and in the absence of a sworn plea by the party whose name appears on the back, he can not deny that he was a joint maker of the note.⁴

See the observations (especially as to the affidavit), and the cases noted, under the head of "Pleas, etc., denying execution of written instruments," *ante*, and the additional cases noted below;⁵ also the remarks under the head of pleas in abatement, *ante*.

Plea of nul tiel corporation.—The plea of *nul tiel corporation* appears to be of modern introduction. It is not to be found in the older books on pleading, though now in common use. Formerly it was held, that where a private corporation sued, either on a contract or to recover real property, it must, at the trial under the general issue, show that it was a corporation, or be non-suited; but the rule now prevails that in a suit brought by a corporation, the defendant, by pleading the general issue, admits the capacity of the plaintiff to sue. If he would deny the existence of the corporation, he must put in a plea for that purpose.⁶ It can not be put in issue by the

¹ *Warren v. Chambers*, 12 Ill. 124; *Zuel v. Bowen*, 78 Ill. 234.

² *Shufeldt v. Seymour*, 21 Ill. 524.

³ *McKinney v. Peck*, 28 Ill. 174.

⁴ *Lincoln v. Hinzey*, 51 Ill. 435.

⁵ *Petrie v. Newell*, 13 Ill. 647; *Stillson v. Hill*, 18 Ill. 262; *Robinson v. Magarity*, 28 Ill. 423; *Warren v. Ball*, 37 Ill. 76; *Governor v. Lagow*,

43 Ill. 134; *Gardner v. N. W. M. Co.*, 52 Ill. 367.

⁶ *McIntire v. Preston*, 5 Gilm. 48; *Morris v. Trustees*, 15 Ill. 266; *Spangler v. Ry. Co.*, 21 Ill. 277; *Hoereth v. Mill Co.*, 30 Ill. 151; *Legnard v. Crane Co.*, 54 Ill. App. 149; *Bailey v. Bank*, 127 Ill. 332.

general issue, and notice denying that the plaintiff is a corporation.¹

Where the plaintiff sues as a corporation, no further allegation that it is such is necessary.² But where a chartered company seeks to enforce rights which do not ordinarily and necessarily belong to such corporations, it must set forth and prove its authority for so doing.³

A plea of *nul tiel corporation* is a plea in bar, and may be interposed with other pleas. Where a corporation sues by a wrong name, the defendant can only take advantage of it by a plea in abatement; but where there is no misnomer, he can only plead *nul tiel corporation* in bar.⁴ The issue on the plea is for the court and not for a jury.⁵

In an action of replevin, where the defendant justified the taking of the property as collector of taxes for a municipal corporation, and the plaintiff replied that there was no such corporation as that for which the defendant claimed to be collector of taxes, the replication was held bad, because the question whether or not such town had ever been incorporated or had forfeited its franchises, could not be tried in such collateral proceeding.⁶

A plea denying that the plaintiff is a corporation is overcome by proof that the defendant sold land to the plaintiff, and made and delivered to it a deed of conveyance, thus recognizing the plaintiff as a corporation.⁷ Where certain persons, composing an association under a name which imports a corporate existence, exercise corporate powers by that name,

¹ *Bailey v. Bank*, 127 Ill. 332.

² *Frye v. Bank*, 5 Gilm. 332; *Har- ris v. Mfg. Co.*, 4 Blackf. (Ind.) 267; see *McIntire v. Preston*, 5 Gilm. 48.

³ *Frye v. Bank*, 5 Gilm. 332.

⁴ *Hoereth v. Mill Co.*, 30 Ill. 151; *Mellor v. Spateman*, 1 Saund. 340; *Society v. Pawlett*, 4 Peters, 501; *Stoddard v. Church*, 12 Barb. 573; see *Express Co. v. Haggard*, 37 Ill. 465; *Osborn v. People*, 103 Ill. 224; *Hudson v. Seminary*, 113 Ill. 618.

⁵ 1 Chit. Pl. 557; *Brady v. Commonw.* 1 Bibb. 517; *Eppes v. Smith*, 4 Murf. 466; *Boucher v. Wilbourson*, 1 Dana 227.

⁶ *Coal Co. v. Andrews*, 53 Ill. 176; see *Brown v. Mortgage Co.*, 110 Ill. 235; *Osborn v. People*, 103 Ill. 224; *Ry. Co. v. Shires*, 108 Ill. 617.

⁷ *Wood v. Coal Co.*, 48 Ill. 356; *Mix v. Bank*, 91 Ill. 20; *Mitchell v. Deeds*, 49 Ill. 416; *Lombard v. Cong.* 64 Ill. 477.

they should not be heard to deny that there is any such corporation.¹

No. 140. *Plea of nulltiel corporation.*

(As in No. 85 ante, to the asterisk, and thence as follows:) that there is not, nor was at the time of the commencement of this suit, any such corporation as the — — company, as by the said declaration is above supposed: And of this the defendant puts himself upon the country, etc.

PLEA OF PUIS DARREIN CONTINUANCE.

A plea *puis darrein continuance* must show some matter of defense which has arisen since the last continuance—that is, *since the last stage of the suit*; and it is said that the day of continuance, and the time and place when and where the matter of defense arose must be set forth. Great certainty is requisite in pleas of this description.²

A plea of this kind involves grave legal consequences that do not attach to an ordinary plea. It only questions the plaintiff's right to further maintain the suit. When filed, it, by operation of law, supersedes all other pleas and defenses in the cause, and the parties proceed to settle the pleadings *de novo* just as though no plea or pleas had theretofore been filed in the cause. By reason of pleas of this kind having a tendency to delay, great strictness is required in framing them.³

There is a distinction to be observed between a plea setting up matter of defense which has arisen since the commencement of the action, but before plea pleaded, and one alleging matter of defense which has arisen after plea pleaded. The former is not, properly speaking, a *plea puis darrein continuance*.⁴ It is said that "when matter of defense has arisen after the commencement of the suit it can not be pleaded in bar of the action generally, but must, when it has arisen before plea or continuance,

¹ *Express Co. v. Bedbury*, 34 Ill. 459; *Powder Co. v. Hotchkiss*, 17 Ill. App. 622; *Ry. Co. v. Ry. Co.*, 75 Ill. 113; *Thompson v. Candor*, 60 Ill. 244; *Hudson v. Seminary*, 113 Ill. 618; *Fitzpatrick v. Rutter*, 58 Ill. App. 532.

² *Ross v. Nesbit*, 2 Gilm. 252; 1 Chit. Pl. 572; *Kenyon v. Sutherland*,

3 Gilm. 99; *Rybolt v. Milliken*, 5 Bradw. 490; *Straight v. Hanchett*, 23 Ill. App. 584.

³ *Mount v. Scholes*, 120 Ill. 394.

⁴ *Kenyon v. Sutherland*, 3 Gilm. 99; *Lincoln v. McLaughlin*, 74 Ill. 11; *Gibson v. Bourland*, 13 Ill. App. 352.

be pleaded as to the further maintenance of the suit, and when it has arisen after issue joined, *puis darrein continuance*.”¹ In an action on the case, however, the defendant is permitted under the general issue to give in evidence a release, a former recovery, a satisfaction or any other matter *ex post facto* which shows that the cause of action has been discharged.² The issues joined may be either of law or of fact.³ Matter of defense arising after plea pleaded can only be taken advantage of by plea of the kind last mentioned.⁴

Pleas *puis darrein continuance* may be either in abatement or bar, according to the subject-matter, and if anything happens pending the suit which would in effect abate it, this may be pleaded *puis darrein continuance* though there has been a plea in bar.⁵ A plea in abatement of this kind begins and concludes like a plea in abatement when pleaded in the first instance.⁶ If matter in abatement is pleaded *puis darrein continuance* the judgment, if against the defendant, is peremptory, as well on demurrer as on trial.⁷ A plea *puis darrein continuance* is a waiver of any former plea or pleas.⁸ It is said that there can be but one plea of this kind in one and the same cause.⁹

A settlement and release of a cause of action, an accord and satisfaction, or other matter arising after the last pleading which goes simply in discharge of the original cause of action, must generally be availed of by plea *puis darrein continuance*.

¹ 1 Chit. Pl. 569; *Rowell v. Hayden*, 40 Me. 582; *Yeaton v. Lyman*, 5 Peters 224; *Cowell v. Weston*, 20 Johns. 414; see *Kenyon v. Sutherland*, 3 Gilm. 99; *City v. Babcock*, 143 Ill. 358; *Mount v. Scholes*, 120 Ill. 394; *Straight v. Hanchett*, 23 Ill. App. 584.

² *City v. Babcock*, 143 Ill. 358.

³ Gould's Pl. 346; 1 Chit. Pl. 569.

⁴ *Longworth v. Flagg*, 10 Ohio 300; *Allen v. Newberry*, 8 Clarke (Iowa), 65; *Jessup v. King*, 4 Cal. 331; *McDougal v. Rutherford*, 30 Ala. 253; see Stephen's Pl. 64; Gould's Pl. 345-348; 1 Chit. Pl. 569-573.

⁵ Gould's Pl. 247; 1 Chit. Pl. 571.

⁶ Gould's Pl. 347; see 1 Chit. Pl. 572.

⁷ 1 Chit. Pl. 571; *Renner v. Marshall*, 1 Wheat. 215.

⁸ 1 Chit. Pl. 571; Gould's Pl. 347; *Wallace v. McConnell*, 13 Peters 136; *Good v. Davis*, 1 Hemp. 16; *Adler v. Wise*, 4 Wis. 159; *Mount v. Scholes*, 120 Ill. 394; *City v. Renshaw*, 153 Ill. 491; *Ryan v. R. R. Co.*, 60 Ill. App. 612.

⁹ 1 Chit. Pl. 572, 573; Gould's Pl. 347; *City v. Renshaw*, 153 Ill. 491.

But when the parties seek not only to adjust the amount of the claim, but further, to have judgment entered for such amount, the court may, on motion, execute the agreement by giving judgment in pursuance thereof.¹

Where issue is taken on a plea of payment and satisfaction of this description, evidence of a settlement of accounts, and payment of the amount found due, is admissible; so is an order from the plaintiff, to his attorney of record, to discontinue the suit.²

Regularly, if the defendant suffers another continuance to intervene before he pleads the new matter—does not plead it at the first opportunity after the happening of it—he waives it, and can not afterward plead it.³ But whether or not a plea of this kind shall be pleaded after a continuance has intervened is in the discretion of the court,⁴ which may give leave to plead it *nunc pro tunc*; and when the court thus exercises its discretion, it may impose the payment of costs.⁵

It is said that no plea *pais darrein continuance* can be pleaded after a demurrer determined, or verdict found,⁶ though it may after the jury has gone from the bar.⁷ But in a case in Illinois, where the defendant was sued in an action of debt on a statute, for the penalty, and after verdict against him, but before judgment, the legislature passed an act releasing all penalties incurred under that statute (including those sued for), it was held that this might be pleaded *pais darrein continuance*;⁸ and in New York an insolvent has been allowed to plead his discharge even after verdict.⁹

Such plea may, in Illinois, be filed at any time before trial.¹⁰ Pleas after the last continuance must be verified by affidavit;¹¹ but it is held in Illinois that pleas of this kind in *bar* need not be so verified.¹²

¹ *Washington v. Ry. Co.*, 136 Ill. 49.

² *Neil v. Hepburn*, 6 Ohio 534.

³ Gould's Pl. 346.

⁴ *Rowell v. Hayden*, 40 Me. 582; *Morgan v. Dyer*, 10 Johns. 161; *Tufts v. Gibbons*, 19 Wend. 639; *Rangley v. Webster*, 11 N. H. 299.

⁵ 1 Chit. Pl. 571; *Stevens v. Thompson*, 15 N. H. 510.

⁶ Gould's Pl. 347; 1 Chit. Pl. 472.

⁷ 1 Chit. Pl. 572.

⁸ *Coles v. County*, Breese 154.

⁹ *Bank v. Hazard*, 9 Johns. 392; *Mount v. Scholes*, 120 Ill. 394.

¹⁰ *City v. Renshaw*, 153 Ill. 491; *Robinson v. Burkell*, 2 Scam. 278.

¹¹ 1 Chit. Pl. 660; *Mount v. Scholes*, 120 Ill. 394.

¹² *Robinson v. Burkell*, 2 Scam. 278; see *Ross v. Nesbitt*, 2 Gilm. 252.

The following form of a plea of this kind is given in Chitty on Pleading, vol. 3, page 1238.

(*Title of court, etc.*) And now at this day, that is to say, on — next after —, in this same term, until which day the plea aforesaid was last continued, comes the said A. B., by —, his attorney, and the said C. D., by his attorney aforesaid; and the said C. D. saith that the said A. B. ought not further to have or maintain his aforesaid action thereof against him, because he saith, that after the last continuance of this cause, that is to say after — next after —, in this same term, from which day this cause was last continued, and before this day, to wit, on, etc., at, etc., he, the said A. B. (*here state the release, * * * or other subject-matter of the plea;*) and this he, the said C. D., is ready to verify; wherefore he prays judgment if the said A. B. ought further to have or maintain his aforesaid action thereof against him, etc.

The following form of a plea, denominated a “*plea to the further maintenance of the action,*” is given in Andrews’ Stephen’s Pleading, page 156.

(*Title of court, etc.*) The said defendant, by his attorney [*or in person*], says, that the said plaintiff ought not *further* to have or maintain his aforesaid action against him; because, he says, that after the last pleading in this cause, that is to say, on the — day of —, in the year of our Lord —, the said plaintiff, by his certain deed of release, sealed with his seal, [*the release may be here stated, * * **]. And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought *further* to have or maintain his aforesaid action against him, etc.

It is submitted that the following form is suited to our mode of practice, and is sufficient.

No. 141. *Plea puis darrein continuance.*

In the — — Court.

— Term, 18—.

C. D.)
ats. } *Assumpsit.*

A. B.) And now on this — day of —, in this same term, comes the defendant, by his attorney aforesaid, and says that the plaintiff ought not further to maintain his aforesaid action against him, the defendant, because he says, that after the last pleading (*or, if there were any proceedings after the last pleading, say “after the last proceedings”*), in this cause, that is to say, after the — day of —, in the — term last past, (*or, “in this same term,”*) and before this day, to wit, on, etc., (*here set forth the subject-matter of the plea, as a release, or an award, or a revocation of letters of administration, etc.*) And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action, etc.

CHAPTER VI.

ACCOUNT.

The elementary works which treat of the action of account, and almost every case relating thereto, inform us that it is an action seldom brought. In England it seems to have fallen almost entirely into disuse; and although the action is expressly authorized by the statute, a case is seldom to be met with in the courts of Illinois.¹

Frequently, where this remedy applies, the matters of account are of an intricate and complicated character, involving various interests, and the parties choose rather to resort to a court of chancery, where all the interests involved can be more satisfactorily adjusted and settled.² This action has, however, in Illinois, some advantages over proceedings in chancery, which should not be overlooked. It may, under certain circumstances, be commenced by attachment³ or by *capias*,⁴ thus affording to the plaintiff the advantage of those writs, which may give him more speedy means of securing his claim than can be given in equity. It will be observed that the third section of the statute provides that if the defendant does not appear at the return of the writ, he shall be attached by his body to appear and render his account.

The provisions of the Illinois statute of account, in respect to when this action may be maintained, are given below.

Joint tenants, etc., to account.—Section 1 provides “that where one or more joint tenants, tenants in common, or coparceners in real estate, or any interest therein, shall take and

¹ *Lee v. Abrams*, 12 Ill. 110; see *Bracken v. Kennedy*, 3 Scam. 558. . . . ⁸ *Humphreys v. Matthews*, 11 Ill. 471.

² See *Lee v. Abrams*, 12 Ill. 110; *Bracken v. Kennedy*, 3 Scam. 558. ⁴ 1 Starr & Curtis 357; Rev. Stat. (1893), 190; Rev. Stat. (1895), 192.

use the profits or benefits thereof, in greater proportion than his, her or their interest, such person or persons, his, her or their executors and administrators, shall account therefor to his or their co-tenant, jointly or severally.”¹ A tenant in common can not sue his co-tenant for his proportion of rents, in *assumpsit*. His only remedy is by action of account under the statute, or by bill in chancery.²

By whom brought.—Section 2 provides that the action of account may be sustained—

First. By one joint tenant, tenant in common or coparcener, his or her executor or administrator, against the other or others, who receive, as bailiffs, more than his or their due proportion of the profits or benefits of such estate.

Second. By an executor, or an administrator with the will annexed, being residuary legatees against the co-executor, or co-administrator with the will annexed.

Third. By a residuary legatee against executors and administrators.

Fourth. By and against executors and administrators, in all cases in which the same might have been maintained by and against their testator or intestate.

Fifth. By one or more co-partner or co-partners against the other co-partner or co-partners, to settle and adjust their co-partnership accounts and dealings, making all said co-partners parties to said action, either as plaintiffs or defendants.

Sixth. On book account.

Under this section the right of action is enlarged so that it may be maintained on book accounts.³ The action may be maintained by one partner against another partner or partners, to settle and adjust partnership accounts, and may be so maintained immediately upon the dissolution of the partnership, and without any previous adjustment of the accounts.⁴

Compelling account.—Section 3 provides that when any person is or shall be liable to account as guardian, bailiff or receiver, or otherwise, to another, and will not give an

¹ 1 Starr & Curtis 187; Rev. Stat. (1893), 104; Rev. Stat. (1895), 104; see *Woolley v. Schrader*, 116 Ill. 29.

² *Crow v. Mark*, 52 Ill. 332.

³ *Garrity v. Hamburger*, 136 Ill. 499.

⁴ *Horn v. Ingraham*, 125 Ill. 198; *Bonney v. Stoughton*, 122 Ill. 536.

account willingly, the party to whom such an account ought to be made, may bring his or her action of account; and if the person against whom such action may be brought be summoned, and does not appear at the return of the writ, and abide the order of the court, then such defendant shall be attached by his body to appear and render his account.

Process.—Section 4 provides that the original process in actions of account shall be the same as is or may be provided by law for other personal actions, and shall be served and returned in the same manner.

Form of declaration.—Section 5 provides that the declaration in an action on book account, (except the commencement and conclusion,) may be in the following form, to wit :

In a plea that the defendant render to the plaintiff the sum of — dollars, which the plaintiff says is justly due from the defendant, to balance book accounts between them, as by the plaintiff's original book, ready to be produced in court, may appear: Now the plaintiff says that the defendant, though often requested, has ever refused, and still does refuse, to settle and adjust the account of the plaintiff, or to pay the balance thereon due.

Trial—Judgment.—Section 6 provides that "If the defendant in an action of account shall plead in defense any plea, which being true, he ought not to account, the issue thereon may be tried by a jury, and if a verdict be found against him, or if such defendant shall not appear, or appearing, shall confess that he ought to account with the plaintiff, the court shall render judgment that he do account."¹

The only plea in bar to an action of account which may be interposed before the court, is one which shows that the defendant is not then liable to account to the plaintiff, and no such plea can be filed after the entry of the interlocutory judgment to account. In such case no plea to the declaration is needed, and no issue is required to be made up thereon.² No formal pleas are allowed before the auditors.³

The only issue before the court is whether there should be an accounting. Evidence is therefore inadmissible before the

¹ See *Garrity v. Hamburger Co.*, 136 Ill. 499.

² *Ibid.*, 136 Ill. 499.

³ *Ibid.*, 136 Ill. 499; *Lockwood v. Doane*, 107 Ill. 235; *Culver v. Elwell*, 73 Ill. 536.

court as to whether or not profits had accrued, or whether one tenant in common or joint tenant had received more than his share.¹

The judgment *quod computet* merely determines the defendant's liability to account, but determines nothing as to what may be due after account taken. If the liability to account is denied, the issue may be tried by a jury.²

Auditors.—Section 7 provides that “Whenever a judgment shall be rendered against any defendant that he accounts, the court shall appoint one or more able, disinterested and judicious men as auditors, to hear, examine and adjust the accounts between the parties, who shall, before they enter on their duties, be sworn faithfully and impartially to take and state the account between the parties, and make report to the court.”

In the absence of any showing otherwise, it will be presumed that the auditors took the requisite oath to faithfully and impartially take and state the account between the parties.³ The requirement that an auditor, in an action of account, shall be sworn before entering upon his duties is not jurisdictional, but is one that may be waived by the parties; and the appearance of the parties before the auditor, and the examination of witnesses, without objection that he is not sworn, will constitute such waiver, and the fact that one appointed an auditor in an action of account is also a master in chancery of the same court in which the action at law is pending, will not relieve him of the necessity of being sworn, if there be no waiver of the oath before entering upon the discharge of his duties.⁴

Hearing before auditors—Notice—Default.—Section 8 provides that “Such auditors, or a majority of them, shall have power to appoint the time and place for the hearing, and shall cause reasonable notice thereof to be given to the parties, and if the defendant shall fail or refuse to attend at the time

¹ *Hawley v. Burde*, 6 Bradw. 454.

² *Garrity v. Hamburger*, 136 Ill.

³ *Pardridge v. Ryan*, 134 Ill. 247; 499.

Garrity v. Hamburger Co., 136 Ill.

⁴ *Pardridge v. Ryan*, 134 Ill. 247.

499; *Lee v. Yanaway*, 52 Ill. App. 23.

and place appointed, and render his account, or appearing, shall not render an account, the auditors shall proceed to take the account, and shall award to the party appearing such sum as, on his showing, shall appear to be justly due, which showing shall be on the oath of the party, or other evidence, as the nature of the case may require or admit."

Administering oaths—Witnesses.—Section 9 provides that any auditor, so appointed, may administer all necessary oaths or affirmations, either to parties or witnesses, in the hearing and examination of such accounts, and require, by subpoenas, the attendance of such witnesses and the production of such books and papers as may be required by either party.

Taking account—Testimony—Compelling witnesses.—Section 10 provides that "at the time and place of the hearing, such auditors, or a majority of them, shall proceed to take and state the accounts, and take the testimony of witnesses, and examine either or all of the parties, on oath, respecting any account or item thereof submitted by either party, and compel the attendance of witnesses and production of books and papers. If either party or any witness shall refuse to be sworn or answer proper questions respecting said accounts, or any item thereof, the auditors, or a majority of them, may report the same to the court, and the court shall commit him to jail, there to remain until he consent to be sworn, or answer the interrogatories, or be discharged by the court according to law; or if any party shall refuse to be sworn or to answer directly any question put by the auditors or under their direction, such refusal, relative to the particular matter to which oath or answer is required, shall be taken against the party so refusing."

The statute contemplates that the auditors shall hear the evidence and pass upon questions of fact, and if any question of law arises upon which they deem it advisable to take the opinion of the court, it may be done by having the question certified to the court and there decided.¹ The admission of incompetent and improper evidence before the auditor will not require the court to set aside the report, when there appears sufficient competent evidence to sustain the auditor's finding.²

¹ *Garrity v. Hamburger*, 136 Ill. 499.

² *Pardridge v. Ryan*, 134 Ill. 247.

Adjusting accounts—Report—Judgment—Costs.—Section 11 provides that the “auditors, or a majority of them, shall liquidate and adjust the accounts and state the balance, and to whom due, and make report to the court, and if no just cause be shown to the contrary, after the same shall be approved by the court, judgment shall be rendered on such report for such sum as shall be found in arrear from either party, with costs; and the party in favor of whom the report is made shall pay the auditors their fees, to be fixed by the court, which shall be taxed as costs.”

Where the liability to account is conceded, the judgment *quod computet* is the only one that can be entered prior to the coming in of the auditor's report,¹ and the final judgment then entered is based upon the auditor's report, and only indirectly upon the declaration.²

Producing books.—Section 12 provides “that the court before which the action shall be pending, and also the auditors so appointed, or a majority of them, may call upon either party to produce, at any time pending the suit, either his ledger or original book of entries, or both, as they may think proper, and no disputed account shall be allowed upon the oath of the party, when it shall appear that he has an original book of entries, unless such book shall be produced upon reasonable request.”

Consolidation of accounts.—Section 13 provides that “the auditors appointed in any action of account, in hearing, examining and adjusting the accounts of the parties, shall hear, examine and adjust all the accounts existing between them of a similar nature, and in the same right, to the time of such hearing, including all questions of interest thereon.”

Notice of hearing.—Section 14 provides that “the auditors may notify the parties of the time and place of hearing by causing them, or either of their attorneys of record, to be personally notified, or by citation, left at such parties' usual abode, at least ten days previous to the time of such hearing; and if the party have no domicile in this state, and have no attorney of record, by leaving such citation in the office of the

¹ *Garrity v. Hamburger*, 136 Ill. 499; *Pardridge v. Ryan*, 134 Ill. 247. ² *Garrity v. Hamburger*, 136 Ill. 499.

clerk of the court in which such action shall be pending, at least thirty days before the time of hearing, which shall be deemed sufficient notice."

Continuances.—Section 15 provides that "the auditors may continue the hearing of any account from time to time, in their discretion."

Pleadings.—Section 16 provides that "no formal pleading shall be allowed to be filed before the auditors who may be appointed to take and state an account between the parties in any action of account."¹

Accounting before justices.—Section 17 provides that "justices of the peace shall have jurisdiction in all actions on book account where the amount of the balance owing to the plaintiff shall not exceed \$200; and in such actions brought before a justice of the peace, on book account, or when any book account shall be pleaded in offset before a justice of the peace, such justice shall have the same power to examine parties under oath that is given to auditors under this act."

Jurisdiction.—Section 18 provides that "in all cases commenced under the first, fourth and fifth enumerations in section 2 of this act, the several courts of record in this state having chancery jurisdiction are empowered to hear, try and determine the same, to appoint auditors or commissioners in their discretion, to take testimony or to find the state of facts, or to take, adjust and state accounts between said co-tenants, co-parceners or co-partners; and said courts are also empowered to make all such orders and decrees, either interlocutory or final, as may enable such courts to do complete justice to all parties, and such as such courts sitting in chancery could lawfully make in order to the adjustment and final settlement of all co-partnership accounts, matters and dealings whatever; and such courts shall render final judgment or judgments in any such action in favor of or against such co-tenants, co-parceners or co-partners respectively, as shall be just and equitable, and such as said courts, sitting in chancery, might render, and may enforce such

¹See *Garrity v. Hamburger*, 136 Ill. 499; *Lockwood v. Doane*, 107 Ill. 235; *Culver v. Elwell*, 73 Ill. 536.

judgment or judgments by execution, or in any other way in which such courts sitting in chancery could enforce the same."

Powers of auditors.—Section 19 provides that "auditors and commissioners, appointed agreeably to the provisions of the last preceding section, shall have the same power to administer oaths to parties and witnesses, and to compel the attendance of witnesses and the production of books and papers, and the parties shall have the same right and be under the same obligation to testify, as is provided in actions of account generally."

Action on book account.—Section 20 provides that "Whenever, on the trial of any action on book account, it shall appear to the court that any item or items of account, or deal between the same parties, more properly belong to some other action of account under this act, the same may be tried and adjusted in said action on book account."

If it shall appear to the court upon the trial of an action of assumpsit, or other action, that the trial more properly belongs to an action of account, it will be competent for the court not only to try and adjust the account between the parties in such pending action the same as though brought as an action of account, but where no objection is interposed, to adjudge that the form of action be changed to an action of account. In such case the court may allow a count in the action of assumpsit to be filed, which will be taken as a substitute for the original count in assumpsit.¹

Appeal—Error.—Section 21 provides that "either party may appeal or prosecute a writ of error from the final judgment rendered under and by virtue of this act, in the same manner and upon the same conditions as provided by law in other cases."

An order to account is an interlocutory order from which an appeal will not lie.²

Chancery jurisdiction preserved.—Section 22 provides that "nothing in this act contained shall be so construed as to de-

¹ *Garrity v. Hamburger*, 136 Ill. 23; *Anderson v. Lundburg*, 41 Ill. 499; *Pardridge v. Ryan*, 134 Ill. 247. App. 248; *Motor Co. v. Lewis*, 47 Ill.

² *Lee v. Yanaway*, 52 Ill. App. App. 576.

prive courts of chancery of their jurisdiction in matters of account."

Suits between executors, etc.—Section 119 of the act on administration provides that "where there are two or more executors or administrators of an estate, and any one of them takes all or a greater part of such estate and refuses to pay the debts of the decedent, or refuses to account with the other executor or administrator, in such case the executor or administrator so aggrieved may have his action of account or suit in equity against such delinquent executor or administrator, and recover such proportionate share of said estate as shall belong to him; and every executor, being a residuary legatee, may have an action of account or suit in equity against his co-executor or co-executors, and recover his part of the estate in his or their hands. Any other legatee may have the like remedy against the executors; *provided*, that before any action shall be commenced for legacies as aforesaid, the court shall order them to be paid."¹

Limitations.—The action of account is barred unless commenced within five years next after the cause of action shall have accrued,² and it has been held that the right of action by a partner did not accrue until the partnership had ceased to exist.³

Demand.—A demand to account, or something which amounts to such demand, is in general necessary to perfect the cause of action.⁴ But the plaintiff is not put upon proof of the demand, except by plea denying it; and the plea of "never bailiff" does not have that effect.⁵

Time for which account is to be taken.—The weight of authority seems to sustain the rule, that even if the period to which the account is to extend is specified, yet the account

¹ Rev. Stat. (1891) 129; Rev. Stat. (1895) 129; 1 Starr & Curtis, 245.

² *Quayle v. Guild*, 91 Ill. 378; *Richardson v. Gregory*, 126 Ill. 168; *Bonney v. Stoughton*, 122 Ill. 536; *Horne v. Ingraham*, 125 Ill. 198.

³ *Askew v. Springer*, 111 Ill. 662; *Blake v. Sweeting*, 121 Ill. 70

⁴ *Chadwick v. Dival*, 12 Verm. 501; but see *Sturges v. Bush*, 5 Day (Conn.) 452.

⁵ *Chadwick v. Dival*, 12 Verm. 501; see *Stedman v. Gassett*, 18 Verm. 347; *Aiken v. Smith*, 21 Verm. 173.

shall be brought down to the time of the award of the auditors, without regard to the time laid in the declaration.¹

No. 140. Against a bailiff, to account for goods.

In the ——— Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of ——. } sct. A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea that he render to the plaintiff a reasonable account for the time he, the defendant, was (*) bailiff to the plaintiff, in the county aforesaid: For that whereas the defendant, on the — day of —, in the year 18—, and from thence until the — day of —, in the year 18—, was there bailiff to the plaintiff, and during that time there had the care and administration of divers goods of the plaintiff, to wit, sixty barrels of sugar, twenty sacks of coffee and fifty sacks of salt, of the value of — dollars, to merchandise and make profit thereof for the plaintiff, and thereof to render him a reasonable account, when he, the defendant, should be thereto requested: Yet the defendant, though he was afterwards, to wit, on, etc., there requested by the plaintiff thereunto, has not rendered to him a reasonable account of the said goods, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

A person is chargeable as bailiff where he has the administration or charge of lands, goods or chattels (or even moneys), to make the best benefit thereof for the owner.² Against such bailiff an action of account lies for the profits which he has raised or made, or might, by his industry and care, have reasonably raised or made, his reasonable charges and expenses being deducted.³

Where the defendant is charged as bailiff, the declaration should specify the particular goods of which he had the care and management.⁴

No. 141. Against a receiver.

(*As in last precedent, to the asterisk:*) receiver of the moneys of the plaintiff, in the county aforesaid: For that whereas the defendant was there receiver of the moneys of the plaintiff, from the — day of, etc., until, etc., during which time the defendant there received, of the moneys of

¹ 1 Freem. Pr. 246.

⁴ *McMurray v. Rawson*, 3 Hill (N.

² 1 Humph. Pr. 184; Co. Litt. 271. Y.) 59.

³ *Sargent v. Parsons*, 12 Mass. 149.

the plaintiff, — dollars by the hands of one J. K., — dollars, by the hands of one L. M., and — dollars by the hands of one N. O., amounting in the whole to — dollars, to render a reasonable account thereof to the plaintiff, when he, the defendant, should be thereto requested: Yet the defendant, though he was afterwards, to wit, on, etc., there requested by the plaintiff so to do has not rendered to him a reasonable account of the said moneys, but so to do has refused, and still refuses; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

A person is chargeable as receiver where he receives money for the owner;¹ but not where he receives property to sell for the owner, and retains the money arising from the sales; there he is chargeable as bailiff. He is also chargeable as receiver of goods, when such receiving is not coupled with an authority to sell.²

A receiver is answerable only for the precise sum of money, or goods, received;³ and he can only claim such charges and expenses as are agreed upon.⁴ It seems a defendant may be charged both as bailiff and receiver, in the same count.⁵ In declaring against one as receiver, it is necessary to set forth by whose hands he received; but where he is charged as bailiff it is not necessary,⁶ nor, it is said, when the action is between merchants.⁷ Particularity with regard to the exact amount of the money, or the precise time of receiving it, is not required.⁸

No. 142. By one tenant in common against his co-tenant.

(*Title of court, etc.*) A. B. plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of account render: For that whereas on the — day of, etc., and from thence until the — day of, etc., (or “until and at the time of the commencement of this suit,”) the plaintiff was seized in his demesne, as of fee, of the one undivided half part of certain parcels of land, situate, etc.; and the defendant, and divers other persons whose names are to the plaintiff unknown, during all that time held the said parcels of land together with the plaintiff, as tenants in common; and the defendant there had also, during all that time, the care and management

¹ Co. Litt. 172.

² 1 Humph. Prac. 184.

³ Ol. Prec. 96.

⁴ Co. Litt. 172.

⁵ 1 Humph. Prac. 184, 186.

⁶ Co. Litt. 172a; *Jaggard v. Trip*,
3 Keb. 425; *Bishop v. Eagle*, 11 Mod.

186; *Jordan v. Wilkins*, 2 Wash. (C. R.) 482.

⁷ *Moore v. Wilson*, 2 Chipm. 91; see *Bishop v. Eagle*, 11 Mod. 186.

⁸ *Burdet v. Thrule*, 2 Lev. (K. B.) 126.

of the whole of the said parcels of land, to receive and take the profits and benefits thereof, and as bailiff of the plaintiff of what he, the defendant, received more than his due proportion of the same, to render a reasonable account thereof to the plaintiff, and his share thereof, when he, the defendant, should be thereto requested, according to the form of the statute, etc.: And although the defendant, during the time aforesaid, there received more than his due proportion of the profits and benefits of the said parcels of land, and the plaintiff's share thereof, that is to say, the whole of the said profits and benefits, yet the defendant, though he was afterwards, to wit, on, etc., there requested by the plaintiff so to do, has not rendered to him a reasonable account of the said profits and benefits so received as aforesaid, or any part thereof, or of the said share of the plaintiff, or any part thereof, but refuses so to do, contrary to the form of the statute, etc.; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

A second count may be added, omitting any allegation that the defendant was bailiff, and following the language of the first section of the statute—charging that the defendant took and used the profits and benefits in greater proportion than his interest. A third count may also be added, charging the defendant as bailiff of a moiety of the land, without disclosing that he was tenant in common.

No. 143. Partner against partner, as receiver.

(Commence as in last precedent.) For that whereas on, etc., and from thence until, etc., in the county aforesaid, the plaintiff and the defendant were partners in trade, equal in interest, under the name and firm of, etc.; and during that time the defendant was there receiver of the moneys of the plaintiff and the defendant, belonging to them as partners as aforesaid, and received of such moneys, by the hands of divers persons, divers sums, amounting to — dollars, for the common benefit of the plaintiff and the defendant, and to render to the plaintiff a reasonable account respecting the same, when he, the defendant, should be thereto requested: Yet the defendant, though he was afterwards, to wit, on, etc., there requested by the plaintiff so to do, has not rendered to him a reasonable account in that behalf, but so to do has refused, and still refuses; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.¹

In another count the defendant may be charged, in like manner, with receiving divers goods, etc., describing them generally; and other counts may charge him as bailiff of money and

¹ See *May v. Williams*, 3 Vt. 243; *v. Wilkins*, 2 Wash. (C. C. R.) 482; *James v. Brown*, 1 Dall. 339; *Irvine* Ol. Prec. 103, *v. Hanlon*, 10 S. & R. 219; *Jordan*

goods, to merchandise, etc., for the common benefit of the partners; and others as receiver, and as bailiff, of the plaintiff's share of the money and goods; and still others as tenant in common of the goods, with the plaintiff.

The general rule is, that where the plaintiff declares against one as receiver, the declaration must specify the amounts received, and by whose hands; but it is said that "where the ground of liability is a privity or connection as a partner, or as principal and agent, or bailor and bailee, the nature of which leads to an habitual receiving, and disposing of property, the allegation of that privity, and of the receiving of divers sums, etc., in consequence of it, is sufficient, without stating the sums or the persons from whom received."¹ From the language of the decisions and precedents, however, it would seem better to allege the sums and persons where it can be done. Upon proof of a receipt by the hands of any one of the persons mentioned in the declaration, the plaintiff is entitled to a general verdict under an issue upon the plea of *ne unques receiver*.²

It has been said that in account between mercantile partners, the defendant should be charged as receiver.³ But this would appear to depend on the circumstances, since in the precedents partners are sometimes charged as bailiffs, and sometimes as receivers; and in some cases they are charged as receivers in one count and as bailiffs in another count of the same declaration.⁴

No. 144. Partner against partners, as bailiffs of lands and goods.

(Commence as in No. 142, ante.) For that whereas on, etc., and from thence, until, etc., in the county aforesaid, the defendants were bailiffs to the plaintiff of certain parcels of land of the plaintiff and the defendants, situate, etc., with the appurtenances; and for all that time the defendants there had the care and management of the said parcels of land, with the appurtenances, and received the issues and profits thereof, for the common benefit and profit of the plaintiff and the defendants, and to render to the plaintiff a reasonable account of the same, when they, the defendants,

¹ 1 Freem. Pr. 244; *May v. Williams*, 3 Vt. 243; see *Moore v. Wilson*, 2 Chip. 91; *Bishop v. Eagle*, 11 Mod. 186; Ol. Prec. 104.

² *Irvine v. Hanlin*, 10 S. & R. 219.

³ *McMurray v. Rawson*, 3 Hill (N. Y.) 59.

⁴ *Whelen v. Watmough*, 15 S. & R. 153; Ol. Prec. 97-104; *Humph. Prec.* 189.

should be thereto requested : And also, during all that time, the defendants were there bailiffs to the plaintiff, and had the care and management of great quantities of hay, etc., etc., of the plaintiff, and the defendants, for the common benefit and profit of the plaintiff and the defendants, and to render to the plaintiff a reasonable account thereof, when they, the defendants, should be thereto requested. Yet the defendants, though they were afterwards, to wit, on, etc., there requested by the plaintiff so to do, have not rendered to him a reasonable account of the premises, or any part thereof, but so to do have refused, and still refuse; to the damage, etc.¹

When the action is against two or more partners, a joint liability to account must be shown.² It has been held that the action would not lie where there were more than two partners;³ but this is denied,⁴ and precedents of declarations by one partner against several are found in the reports and the books of forms.⁵

No. 145. Plea—never bailiff.

In the ——— Court.

————Term, 18—.

C. D. }
ats. } *Account.*
A. B. }

And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, (*) that he never was bailiff to the plaintiff, or had the care and administration of the goods in the said declaration mentioned, to merchandise and make profit thereof for the plaintiff, or thereof to render to the plaintiff a reasonable account, when he, the defendant, should be thereto requested, in manner and form as the plaintiff has in the said declaration above alleged: And of this the defendant puts himself upon the country, etc.

No. 146. Plea—never receiver.

(As in the last precedent, to the asterisk :) that he never was receiver to the plaintiff, of the moneys in the said declaration mentioned, or any part thereof, by the hands of the said J. K., L. M. and N. O., or any or either of them, to render to the plaintiff a reasonable account thereof, when he, the defendant, should be thereto requested, in manner and form as the plaintiff

¹ Ol. Prec. 100.

² *Whelen v. Watmough*, 15 S. & R. 153.

³ *Beach v. Hotchkiss*, 2 Conn. 429; *Appleby v. Brown*, 24 N. Y. 143; see *Wood v. Merrow*, 25 Vt. 340; *Mc-*

Murray v. Rawson, 3 Hill (N. Y.) 59; Co. Lit. 172a.

⁴ *Whelen v. Watmough*, 15 S. & R. 153; see 1 Freem. Pr. 239-243.

⁵ *Whelen v. Watmough*, 15 S. & R. 153; Ol. Prec. 97-104; Pl. Assist. 35; 1 Freem. Pr. 239.

has above in the said declaration alleged: And of this the defendant puts himself upon the country, etc.

No. 147. Plea, to declaration by tenant in common, that defendant did not have the care, etc., to render account as bailiff, etc.

(As in No. 145, ante, to the asterisk :) that he never had the care and management of the parcels of land in the said declaration mentioned, or any part thereof, to receive and take the profits and benefits thereof, or, as bailiff of the plaintiff of what he, the defendant, received more than his due proportion of the same, to render a reasonable account thereof, to the plaintiff, and his share thereof, when he, the defendant, should be thereto requested, in manner and form as the plaintiff has above in the said declaration alleged: And of this the defendant puts himself upon the country, etc.

No. 148. Plea, to declaration by tenant in common, that defendant has fully accounted.

And for a further plea in this behalf, the defendant says, etc., etc., because he says, that after the time during which he is in the said declaration alleged to have had the care and management of the said parcels of land in the said declaration mentioned, to receive and take the profits and benefits thereof, and, as bailiff of the plaintiff, to render such account as therein mentioned, to wit, on, etc., he, the defendant, there fully accounted with the plaintiff concerning the said time and the said profits and benefits in the said declaration mentioned, and his said share thereof: And this the defendant is ready to verify; wherefore he prays judgment, etc.

If pleaded to a declaration containing several counts, the foregoing pleas are of course to be limited to the particular count or counts which they are intended to answer. See page 57, *ante*. In the action of account, there is no general issue. The defendant may plead infancy; and when sued as bailiff or receiver in fact, he may plead that he was not bailiff or receiver; but when sued as tenant in common, under the statute, if the declaration is properly framed, a plea (in the ordinary form) that he was not bailiff or receiver would be insufficient. In such case the defendant may deny the tenancy in common. The defendant may also plead that he has accounted, or a release, arbitrament, bond given in satisfaction, and the statute of limitations,¹ and various other matters. A plea is sometimes interposed, denying that there was any request to account;² and

¹ 1 Chit. Pl. 429; Bac. Abr. Acct. E. *Aiken v. Smith*, 21 Vt. 172; see *Chad-*

² *Stedman v. Gassett*, 18 Vt. 346; *wick v. Divol*, 12 Vt. 501.

there is a precedent of a plea that the goods bailed were destroyed by fire.¹

In Illinois, the rule laid down is "to require the defendant to file before the court, in the first instance, every defense which shows that he is not then liable to account to the plaintiff, whether it be that he never was so liable, or that some act has been done which has discharged him from that liability, admitting that it once existed;"² and, by statute, no formal pleadings are now allowed before the auditors.³

The relation of guardian, executor, administrator, tenant in common, etc., may be denied in like manner as that of bailiff or receiver. The pleader is referred to chapter 3, *ante*, *Defenses to an Action*, for replications, pleas in abatement, demurrers, etc.

For an able and elaborate discussion and defense of the action of account, see Freeman's Illinois Forms, Pleading and Practice, sections 456 to 643.

¹1 Wentw. Pl. 88.

² *Lee v. Abrams*, 12 Ill. 110.

³ Rev. Stat. (1893), 106; Rev. Stat. (1895), 106; 1 Starr & Curtis 190.

CHAPTER VII.

COVENANT.

The action of covenant lies for the recovery of damages for the breach of a covenant or contract under seal;¹ and can not be maintained except against a person who, by himself, or some other person acting on his behalf, has executed a deed under seal, or who, under some very peculiar circumstances, has agreed by deed to do a certain thing.² The action may be maintained on the covenant under seal, whether the covenant is *express*, or *implied by law* from the terms of the deed;³ and implied covenants may be set forth in the declaration in the same manner as if they were expressed in the instrument.⁴

It lies upon an indenture of apprenticeship against the master, for not instructing his apprentice, or against the party who covenants for the due service of such apprentice, but it will not lie against an infant apprentice.⁵ It lies on articles of agreement under seal; or deeds for separate maintenance; and on covenants in deeds of conveyance, etc., for good title, etc.; on charter-parties of affreightment; on policies of insurance, under seal, against fire, etc.; and on annuity and mortgage deeds.⁶

It will not lie against the grantee in a deed, for a failure by

¹ *Gale v. Nixon*, 6 Cowen, 445; 188; *Kent v. Welch*, 7 Johns. 258; *Ludlum v. Wood*, 2 N. J. L. 55; *Dorsey v. Jackman*, 1 Serg. & Rawle 42; *Trible v. Oldham*, 5 J. J. Marsh. 137; *Vicary v. Moore*, 2 Watts 451; *Davis v. Judd*, 6 Wis. 85; *McVoy v. Wheeler*, 6 Port. (Ala.) 201; 1 Chit. Pl. 105.

² *Somerville v. Stephenson*, 3 Stewart 271; *Rees v. Overbaugh*, 6 Cowen 746; *Powers v. Ware*, 2 Pick. 451; 1 Chit. Pl. 115.

³ *Frost v. Raymond*, Cai. (N. Y.)

⁴ *Grannis v. Clark*, 8 Cowen 36; *Tompkins v. Elliott*, 5 Wend. 502.

⁵ 1 Chit. Pl. 105; *Commonwealth v. Willbank*, 10 Serg. & Rawle 416.

⁶ 1 Chit. Pl. 106; *Nichols v. Carr*, 35 Penn. 381; *Herron v. Ins. Co.*, 28 Ill. 235.

the grantee, after the accepting of the deed and taking possession under it, to perform the conditions upon which the deed, as therein expressed, was executed.¹ It is the peculiar remedy upon contracts under seal, where the damages are unliquidated and depend in amount on the opinion of the jury, in which case neither debt nor assumpsit can be supported.²

Covenant, not debt, lies on a writing obligatory for the payment of a certain sum in land office money,³ or in United States bank notes,⁴ or in "banking money,"⁵ or in "lumber."⁶

So covenant, not debt, lies for installments of a sealed note, due and sued for before the coming due of the last installment.⁷ Covenant will not lie on the condition in a title bond to convey land.⁸ It will not lie on a contract under seal, which has been materially varied by a subsequent parol agreement. The remedy is on the subsequent agreement.⁹

Covenant will lie upon a fire insurance policy which has been renewed, and which provided that the same might be continued in force, the premium being paid, and a renewal receipt given.¹⁰ The remedy by covenant for a breach of contract for the sale of lands, is bungling and inadequate; the equity remedy is better and ought to be encouraged.¹¹ A plaintiff may sustain covenant on a sealed instrument, although it may be so defectively executed on his part that only assumpsit can be maintained against him.¹²

Where a grantee of land who holds under a deed containing covenants of seizin, warranty, etc., is obliged to yield up the premises in favor of a prior mortgagee, he can not resort to a court of chancery for relief against his grantor, because he has

¹ *R. R. Co. v. Beckmeir*, 72 Ill. 267; *Burnett v. Lynch*, 5 Barn. & Cress, 589.

² 1 Chit. Pl. 108; *Hedges v. Gray*, 1 Blackf. 216; *Wilson v. Hickson*, 1 Blackf. 231,

³ *Hedges v. Gray*, 1 Blackf. 216.

⁴ *Osborn v. Fulton*, 1 Blackf. 233; *Wilson v. Hickson*, 1 Blackf. 230.

⁵ *Harper v. Levy*, 1 Blackf. 294.

⁶ *Cassady v. Laughlin*, 3 Blackf. 134.

⁷ *Stevens v. Chamberlin*, 1 Vt. 25; *North v. Eslava*, 12 Ala. 24.

⁸ *Huddie v. Worthington*, 1 Ohio, 423; *Abrams v. Kounts*, 4 Ohio 214.

⁹ *McVoy v. Wheeler*, 6 Port. (Ala.) 201; *Raymond v. Fisher*, 6 Mo. 29; *Foundry v. Hovey*, 21 Pick. 417.

¹⁰ *Herron v. Ins Co.*, 28 Ill. 235.

¹¹ 1 Grant (Penn.) 83.

¹² *Directors v. McFadden*, 1 Grant (Penn.) 230.

a complete remedy at law, by action of covenant.¹ The action will lie for the breach of a covenant by defendant that he will abstain from the exercise of his calling for a limited time in a particular place.²

Covenants in deeds relating to lands—What will constitute a breach, etc.—To constitute a breach of covenants for quiet enjoyment, there must be a union of acts of disturbance and lawful title.³ At least, the covenantee must affirmatively prove that his adversary has a paramount title against which it would be unavailing to struggle.⁴

A covenant of warranty is prospective and runs with the land into the hands of all those to whom it may come by purchase or descent;⁵ and the grantees in a deed of conveyance can not claim the benefits of any covenants in the deeds to those from whom he takes, except those for quiet enjoyment and warranty.⁶

The covenant of warranty is broken only by an eviction or something equivalent thereto;⁷ and on an action for the breach thereof, the plaintiff must show an eviction or ouster by some title paramount to the grantors.⁸

In a case where the grantor had covenanted that the grantee should peaceably and quietly hold the premises without any let, suit, etc., of the grantor, or any person lawfully claiming under him, and that they were free from all former incumbrances, of what nature or kind soever, made by the grantor, it was held that a judgment against the grantor, outstanding at the time of executing the deed, was a breach of the covenant.⁹

A covenant of seizin is broken, if at all, the moment it is

¹ *Ohling v. Luitjens*, 32 Ill. 23.

² *Boyer v. Watson*, 52 Ill. App. 361.

³ *Beebe v. Sweet*, 3 Gilm. 162; *Barry v. Guild*, 126 Ill. 439.

⁴ *Furness v. Williams*, 11 Ill. 229.

⁵ *Brown v. Metz*, 33 Ill. 339; *Claycomb v. Munger*, 51 Ill. 373; *Wead v. Larkins*, 54 Ill. 489; *Dorsey v. R. R. Co.*, 58 Ill. 65; *Sterling Co. v.*

Williams, 66 Ill. 395; *Fitch v. Johnson*, 104 Ill. 111.

⁶ *Barry v. Guild*, 126 Ill. 439.

⁷ *Brady v. Spurr*, 27 Ill. 478; *Owen v. Thomas*, 33 Ill. 320; *Jones v. Warner*, 81 Ill. 343; *Scott v. Kirkendall*, 88 Ill. 465.

⁸ *Owen v. Thomas*, 33 Ill. 320; *Jones v. Warner*, 81 Ill. 343.

⁹ *Hall v. Dean*, 13 Johns. 105; *Watson v. Gardner*, 119 Ill. 312.

made;¹ and when a grantee in a deed containing a covenant of general warranty has taken possession, he can not maintain an action for a breach of such covenant until evicted by legal proceedings, or until he yields to a paramount title.²

The entry of a mortgagee, for foreclosure, in pursuance of Rev. Stat., C. 107, of Mass., is held to be such an eviction;³ so if the grantee yields without suit, to one having a paramount title, demanding possession,⁴ or if he buys in such paramount title in order to avoid eviction;⁵ but the burden of the proof is on to him, to show that the title to which he yields is good.⁶

The existence of an inchoate right of dower has been held to constitute a breach of the covenant against incumbrances.⁷ A right of way over land is an incumbrance.⁸ And where a devisee, holding an inalienable life estate in land, executed a conveyance of the premises, in fee, covenanting against all incumbrances, it was held that the existence of this life estate, inalienable in its character, in the grantor, was a subsisting incumbrance, and constituted a breach of the covenant against incumbrances immediately upon the execution of the deed.⁹

Where there is an outstanding incumbrance on the land, the purchaser need not wait until he is evicted, but may satisfy the incumbrance, and then resort to his action on the covenant against incumbrances.¹⁰ And if the covenantee dies before the limitation of the ejectment suit, and in reviving the same against his heirs, one is omitted, and the suit progresses to a

¹ *Wadhams v. Swan*, 109 Ill. 46; *Holbrook v. Debo*, 99 Ill. 372; *Brady v. Spurr*, 27 Ill. 478; *King v. Gibson*, 32 Ill. 348; *Baker v. Hunt*, 40 Ill. 264.

² *Owen v. Thomas*, 33 Ill. 320; *Bostwick v. Williams*, 36 Ill. 65; *Jones v. Warner*, 81 Ill. 343; *Scott v. Kirkendall*, 88 Ill. 465; *Dugger v. Oglesby*, 99 Ill. 405.

³ *White v. Whitney*, 3 Metc. (Mass.) 81; *Estabrook v. Smith*, 6 Gray 572.

⁴ *Hamilton v. Cutts*, 4 Mass. 349; *Owen v. Thomas*, 33 Ill. 320.

⁵ *Chapel v. Bull*, 17 Mass. 213.

⁶ *Hamilton v. Cutts*, 4 Mass. 349.

⁷ *Shearer v. Ranger*, 22 Pick. 447; but see *Ayres v. McConnell*, 15 Ill. 230; *Biglow v. Hubbard*, 97 Mass. 195; *McAlpin v. Woodruff*, 11 Ohio St. 120.

⁸ *Harlow v. Thomas*, 15 Pick. 56; *Beach v. Miller*, 51 Ill. 206.

⁹ *Christy v. Ogle*, 33 Ill. 295.

¹⁰ *Willets v. Burgess*, 34 Ill. 494; *Claycomb v. Munger*, 51 Ill. 373; *Harding v. Larkin*, 41 Ill. 413; *McConnell v. Downs*, 48 Ill. 271.

recovery against all the heirs but one, it would still be an eviction.¹

Where an agreement under seal contains several covenants, to be performed by one party, and in consideration of such covenants the other party agrees to perform an act, the first are precedent covenants, and a performance thereof must be averred and proved, to warrant a recovery on the latter and dependent covenant.²

A covenant of seizin only extends to a title existing in a third person, which may defeat the estate granted by covenantors. It does not embrace a title that may be already in the grantee.³ The making of a deed with a covenant of general warranty is a performance of a covenant to make a sufficient conveyance of land.⁴

Where the title fails to a part of the land, sold for a gross sum, the measure of damages for a breach of the covenant of warranty is a sum in such proportion to the whole consideration paid, as the value of that part of the land to which the title has failed bears to the value of the whole land, and interest on such sum.⁵ A covenant to make a general warranty deed is performed by making a deed containing the words, "will warrant and forever defend the title," etc.; and such a covenant is, in effect, a covenant for quiet enjoyment.⁶

The covenants created by the use of the words "grant, bargain and sell," under the 11th section of chapter 24 of the Revised Statutes of Illinois, are not operative when the grantor has inserted other covenants in the deed. This enactment is in derogation of the common law, and should be construed strictly.⁷

A party who contracts to give a deed, with a covenant against incumbrances, does not meet his obligation by offering such a deed, if the property is actually incumbered.⁸

¹ *Harding v. Larkin*, 41 Ill. 414.

² *Hoy v. Hoy*, 44 Ill. 469.

³ *Furness v. Williams*, 11 Ill. 229.

⁴ *Clark v. Lyons*, 25 Ill. 105.

⁵ *Major v. Dunnivant*, 25 Ill. 262;
see *Willets v. Burgess*, 34 Ill. 494;

Wadhams v. Swan, 109 Ill. 48.

⁶ *Athens v. Nale*, 25 Ill. 195.

⁷ *Finley v. Steele*, 23 Ill. 56; *Wums*

v. McGaughan, 7 S. M. 427.

⁸ *Conway v. Case*, 22 Ill. 127; *Silverman v. Loomis*, 104 Ill. 137; *Patterson v. Sweet*, 3 Bradw. 550.

Where a covenant is to be implied from statutory words, the very words of the statute must be used.¹

By statute in Illinois, the words "grant, bargain and sell," in a deed, amount to an express covenant that the grantor was seized of an indefeasible estate, in fee simple, free from incumbrances, done or suffered from the grantor, as also for quiet enjoyment against the grantor, etc.²

A. conveyed land to B., his unmarried daughter, and to the heirs of her body forever. Before issue born of her body, B. made a deed purporting to reconvey the land to A.; afterwards A. conveyed the land to C., with covenants that he was seized of a good, sure, perfect, absolute and indefeasible estate of inheritance in the law in fee simple. Held, that the covenants were broken as soon as it was made, and that C. could sue and recover for the breach, notwithstanding he was put into possession.³

In order to maintain an action upon a covenant of warranty, the party suing, if he has neglected to give notice to the warrantor of the pendency of the action of ejectment, by which he has been evicted, must come prepared to prove that the eviction was by force of an adverse or superior title; in other words, he must show that if the warrantor had appeared, and defended the action of ejectment, he could not have prevented a recovery.⁴ When a contract under seal has afterwards been varied in its terms by a subsequent parol contract made on a new consideration, such substituted agreement must be the subject of an action of assumpsit and not of covenant.⁵

¹ *Vipond v. Hurlburt*, 22 Ill. 226.

² Rev. Stat. (1893), 353; Rev. Stat. (1895), 374; 1 Starr & Curtis 572; see *Hawk v. McCullough*, 21 Ill. 220; *Finley v. Steele*, 23 Ill. 56.

³ *Frazer v. Supervisors*, 74 Ill. 282; *Voris v. Sloan*, 68 Ill. 588; *Butler v.*

Huestis, 68 Ill. 594; *Blair v. Vanblarcum*, 71 Ill. 290.

⁴ *Sisk v. Woodruff*, 15 Ill. 15; *Harding v. Larkin*, 41 Ill. 413; *McConnell v. Downs*, 48 Ill. 271; *Claycomb v. Munger*, 51 Ill. 373.

⁵ *Weinman v. Hughson*, 44 Ill. App. 22.

DECLARATIONS IN COVENANT.

No. 149. *Grantee against grantor, on covenants in a deed of conveyance of land.*

In the — — Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of ——. } sct. A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of breach of covenant: For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, by his deed bearing date of that day, and now to the court here shown, for the consideration therein mentioned did convey and warrant to the plaintiff, his heirs or assigns, in fee simple, certain real estate in the county aforesaid, to wit (*here describe the property*): And the defendant did by the said deed, for himself and his heirs and personal representatives, covenant with the plaintiff, his heirs and assigns, *amongst other things*, that at the time of the making and delivery of the said deed he, the defendant, was lawfully seized of an indefeasible estate, in fee simple, in and to the said real property, and then had good right and full power to convey the same; and that he warranted to the plaintiff, his heirs and assigns, the quiet and peaceable possession of the said real estate, and would defend the title thereto against all persons who might lawfully claim the same. Nevertheless, the plaintiff avers, the defendant was not, at the time of the making and delivery of the said deed, lawfully seized of an indefeasible estate, in fee simple, in and to the said real property, nor had he then good right and full power to convey the same. And the plaintiff further avers, that he could not, by force of the said deed, quietly and peaceably possess the said real estate, nor did nor would the defendant, though often requested, defend the title thereto against all persons who might lawfully claim the same; but on the contrary thereof, one G. H., who had at the time of the making and delivery of the said deed, and still has, lawful right and title to the said real estate, afterwards, to wit, on, etc., evicted the plaintiff from the said real estate, by due process of law, and entered into the same, and kept, and still keeps, the plaintiff out of the possession thereof. (*Any special damages may here be alleged, in this manner*: “by reason of which premises the plaintiff has not only been deprived of the said real estate, and lost a large amount of money, to wit, — dollars, by him expended in repairing and improving the same, but has also been compelled to pay, and has paid, the costs sustained by the said G. H. in prosecuting a certain action of ejectment for the recovery of the said real estate, and has also been compelled to pay, and has paid, a large amount, to wit, — dollars, in endeavoring to defend the said action of ejectment.”) And so the plaintiff says, that the defendant has not kept his covenants aforesaid, but has broken the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

(This form is framed upon the statutory warranty deed in Illinois.) If the breach of the covenants in the deed consists in the fact that the defendant was not seized, and had no right

to convey, it is sufficient to simply negative the covenants.¹ But with regard to the covenants for quiet enjoyment, and against incumbrances, and to warrant and defend, it is necessary to assign the breach, by showing the interruption or incumbrance complained of, or by showing an ouster by an elder title.²

It is said that the costs and counsel fees in the action of ejectment are covered by the general claim of damages, and that it is not necessary to set them out.³ Where, in describing an instrument, the words of art are used, such as indenture, deed, or writing obligatory, which of themselves import that the instrument was sealed by the party, the declaration will be good without averment of sealing.⁴

No. 150. Grantee against grantor—On the covenant against incumbrances in a deed of conveyance.

(Commence as in the last precedent.) For that whereas the defendant, on, etc., in, etc., by his deed bearing date of that day, and now to the court here shown, for the consideration therein mentioned did grant, bargain and sell to the plaintiff, his heirs and assigns, a certain parcel of land in the said deed particularly described, situate, etc., to have and to hold the same to the plaintiff, his heirs and assigns, forever; and the defendant did by the said deed covenant with the plaintiff, his heirs and assigns, *amongst other things*, that at the time of the ensealing and delivery of the said deed the said parcel of land was free and clear from all former or other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever. Yet, the plaintiff avers, the said parcel of land was not, at the time of the ensealing and delivery of the said deed, free and clear from all former or other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever; but on the contrary thereof, the defendant before that time, to wit, on, etc., by his deed of that date had mortgaged the said parcel of land to one G. H., to secure the payment of — dollars, with interest thereon, etc., to the said G. H., by the — day of, etc.; (*) which said sum of money, with interest as aforesaid, is still unpaid, and the said parcel of land is still chargeable with the payment thereof. And so the plaintiff says, that the defendant has not kept his covenant aforesaid, but has broken the same, to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

If the plaintiff has paid off the mortgage debt, then, in lieu

¹ 2 Chit. Pl. 546.

² 2 Chit. Pl. 546.

³ *Rickert v. Snyder*, 9 Wend. 416.

⁴ *Weinman v. Hughson*, 44 Ill. App. 22; *Cabell v. Vaughan*, 1 Saund. 291, note.

of the averment following the asterisk in the above form, say:

"Which said sum of money, with such interest thereon, being still unpaid, and the said deed of mortgage being still an incumbrance on the said parcel of land, the plaintiff, on, etc., to relieve the said parcel of land from the said incumbrance, there paid to the said G. H. the said sum of money, with interest thereon as aforesaid, whereof the defendant then and there had notice; and, though requested, the defendant has not paid to the plaintiff the said sum of money and interest, or any part of the same."

It is sufficient, in the declaration, to say "certain land in the said deed particularly described," as in the above form without any more precise description.¹

No. 151. Second or remote grantee against grantor, on covenant of warranty in a deed of conveyance.

(Commence as in No. 149.) For that whereas the defendant, on, etc., in, etc., by his deed bearing date of that day, and now to the court here shown, for the consideration therein mentioned did grant, bargain, sell and convey to one G. H., his heirs and assigns, a certain parcel of land, with the appurtenances, situate, etc., to wit, (*here describe the property*;) to have and to hold the same to the said G. H., his heirs and assigns, forever: And the defendant did by the said deed covenant with the said G. H., his heirs and assigns, *amongst other things*, that he, the defendant, would warrant and forever defend the said premises to the said G. H., his heirs and assigns, against all lawful claims whatsoever. And the plaintiff avers, that afterwards, to wit, on, etc., the said G. H., by his deed bearing date of that day, and now to the court here shown, for the consideration therein mentioned did grant, bargain, sell and convey the premises aforesaid to the plaintiff, to have and to hold the same to him, his heirs and assigns, forever. Yet, the plaintiff avers, the defendant did not nor would (though often requested) warrant and defend the said premises to the plaintiff, so being such assign of the said G. H. as aforesaid, against all lawful claims whatsoever; but on the contrary thereof, at and after the time of the ensembling and delivery of the defendant's said deed, one J. K. had lawful claim and paramount title to the said premises, and by virtue of his said lawful claim and paramount title the plaintiff afterwards, to wit, on, etc., was evicted from the said premises, by due process of law, and is still kept out of the possession of the same. And so the plaintiff says, that the defendant has not kept his covenant aforesaid, but has broken the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc. (See No. 149, ante, for averment of special damage.)

¹ 2 Chit. Pl. 550, e.

The covenant of warranty is prospective, and runs with the land to all those to whom it may come by purchase or descent. But the covenants of seizin and power to sell are *in præ-senti*, and if the grantor has no title at the time of making them, they are broken as soon as made; and they then become a mere chose in action, not assignable so as to enable the assignee to sue thereon at law, in his own name.¹

No. 152. On a covenant, in a lease, to pay rent.

(Commence as in No. 149, ante.) For that whereas on, etc., in, etc., by a certain indenture then and there made between the plaintiff, of the one part, and the defendant, of the other part, and bearing date of that day, (the counterpart of which said indenture the plaintiff now brings here into court,) the plaintiff did demise and to farm let unto the defendant, his executors, administrators and assigns, a certain parcel of land in the county aforesaid, to wit, (*here describe the property*;) to have and to hold the same to the defendant, his executors, administrators and assigns, from, etc., to, etc.; yielding and paying therefor yearly and every year, to the plaintiff, his heirs or assigns, the clear yearly rent or sum of — dollars, payable quarterly, to wit, on, etc., in each and every year: And the defendant did thereby, for himself, his executors, administrators and assigns, covenant with the plaintiff, his heirs and assigns, *amongst other things*, that he, the defendant, would well and truly pay, or cause to be paid, to the plaintiff, his heirs or assigns, the said yearly rent or sum of — dollars, at the several days and times aforesaid. Yet, the plaintiff avers, after the making of the said indenture, and during the said term thereby granted, to wit, on, etc., a large sum of money, to wit, — dollars, of the rent aforesaid, for — years and a half of the said term, became and was, and still is, in arrear and unpaid to the plaintiff, contrary to the tenor and effect of the said indenture, etc. And so the plaintiff says, that the defendant has not kept his covenant aforesaid, but has broken the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

If both parts of the deed are originals, that is, signed by all the contracting parties, instead of "counterpart," in the *profert*, say "one part of which said indenture," etc. In Illinois, by statute, *profert* is unnecessary.²

In an action upon the covenants in a lease, the covenantees are the proper plaintiffs, and the covenantors the proper

¹ *Brady v. Spurck*, 27 Ill. 478; see *Brown v. Metz*, 33 Ill. 339; *Claycomb v. Munger*, 51 Ill. 373; *Wead v. Larkin*, 54 Ill. 489; *Leopold v. Salkey*, 89 Ill. 412; *Fitch v. Johnson*,

104 Ill. 111; *Webster v. Nichols*, 104 Ill. 160.

² Rev. Stat. (1893), 1073; Rev. Stat. (1895), 1157; 2 Starr & Curtis 1786.

defendants, and in case of the death of some of the parties thereto, the actions must be brought and judgment recovered by or against the survivors.¹

The words "demise" and "demised" in a lease, import a covenant on the part of the lessor of good right and title to make the lease, and also imply a covenant for quiet enjoyment. A covenant can not be sued upon by the person for whose benefit it is made, if he is not a party to the deed, but the suit must be brought in the name of the party with whom the covenant is made. And this rule is not abrogated by section 19 of the Practice Act relating to "sealed instruments."²

No. 153. Apprentice against master, for breach of covenants in indenture.

(Commence as in No. 149, ante.) For that whereas on, etc., in, etc., by a certain indenture then and there made between the plaintiff, (by and with the consent of G. H., his father,) of the one part, and the defendant, of the other part, and bearing date of that day, (one part of which said indenture, sealed with the seals of the plaintiff, the said G. H., and the defendant, is now to the court here shown, the plaintiff did place and bind himself apprentice to the defendant, to learn his art and calling of a blacksmith with him, and to remain with and serve him from the said day of the date of the said indenture until the defendant should attain the age of twenty-one years, to wit, until the — day of, etc.: And the defendant, for the consideration therein mentioned, thereby covenanted with the plaintiff to instruct him, or cause him to be instructed, in the art and calling of a blacksmith, which the defendant then used, and to find and allow to the plaintiff good and sufficient meat, drink, lodging, washing and apparel, both linen and woolen, and all other necessities, both in sickness and in health, during the said term of apprenticeship; and to cause the plaintiff, within the said term, to be taught to read and write, and the ground rules of arithmetic; and at the expiration of the said term to give to the plaintiff a new bible, and two new suits of clothes suitable to his condition in life: As by the said indenture, reference being thereto had, will more fully appear: In pursuance of which said indenture, the plaintiff, on the day first aforesaid, there entered into the service of the defendant, as such apprentice as aforesaid, and remained in such service, under the said indenture, for a long space of time, to wit, from that day until the — day of, etc.; and the plaintiff did always, during that space of time, well and truly keep and perform all things in the said indenture contained, on his part to be kept and performed. And although the plaintiff was always there ready and willing, from the day last aforesaid until the expiration of the said term, to continue well and faithfully to serve the defendant, and keep and perform all things in the said indenture contained, on the part of the plaintiff to

¹ *Walker v. Doane*, 131 Ill. 27.

² *Harms v. McCormack*, 132 Ill. 104.

be kept and performed, whereof the defendant always there had notice; yet the defendant did not nor would, during the residue of the said term, instruct the plaintiff, or cause him to be instructed, in the said art and calling of a blacksmith; nor did nor would the defendant, during the said residue of the said term, find and allow to the plaintiff good and sufficient meat, drink, lodging, washing and apparel, both linen and woollen, and all other necessities both in sickness and in health; nor did nor would the defendant, during that time, cause the plaintiff to be taught to read and write, and the ground rules of arithmetic; nor did nor would the defendant give to him, the plaintiff, a new bible, and two new suits of clothes suitable to his condition in life, although the plaintiff did on, etc., attain the age of twenty-one years. And so the plaintiff says, that the defendant (though often requested so to do) has not kept his covenants aforesaid, but has broken the same; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

In an action of covenant by a master against an apprentice, in Illinois, it would seem that the declaration should sufficiently show an indenture in conformity with the statute (which see), as all indentures, etc., for the taking of any apprentice, etc., not in conformity with the statute, are utterly void, as against such apprentice, etc.¹

No. 154. On a fire insurance policy. (See Nos. 76 and 77 ante.)

Title of court, etc.) A. B., the plaintiff, by E. F., his attorney, complains of the — insurance company, defendant, of a plea of breach of covenant: For that whereas on, etc., in etc., by a certain deed or policy of insurance, sealed with the seal of the defendant, and bearing date of that day, (which said deed or policy the plaintiff now brings here into court,) the defendant, for the consideration therein mentioned, did covenant with the plaintiff in the terms of the said deed or policy, which here follows in these words and figures, to wit: (*Here insert the policy, verbatim. If there are conditions, or proposals, not in the body of the deed, but referred to therein, say: "And the plaintiff avers that the conditions in the said deed or policy mentioned are as follows that is to say;" and then insert the conditions, or proposals, verbatim, or such parts thereof as constitute a condition precedent.*) And the plaintiff further avers, (*proceeding as in No. 76, ante, from the one asterisk to the other:*) And the plaintiff further avers, that although he has kept and performed all things in the said deed or policy contained on his part to be kept and performed, yet the defendant, though often thereto requested, has not paid to the plaintiff the amount of the said loss and damage so by him sustained as aforesaid, or any part thereof, but refuses so to do. And so the plaintiff says, that the defendant has not kept its covenant

¹ Rev. Stat. (1893), 162; Rev. Stat. (1895), 164; 1 Starr & Curtis 297; see *Ford v. McVay*, 55 Ill. 119.

aforesaid, but has broken the same, to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

See the forms of declarations on policies of insurance, in assumpsit, ante, pages 137-140 and the observations there made, and authorities cited.

Covenant will lie upon a fire insurance policy which has been renewed, and which provided that the same might be continued in force—the premium being paid, and a renewal receipt given.¹ The original application for insurance need not be set out in a declaration on the policy. The insured is not bound to set out and prove the truth of his representations. It need not be averred in pleading that the notary, whose certificate formed a part of the preliminary proof of loss, was the nearest notary to the place of the fire, if the certificate is received without objection; if there is such a formal defect in the proof of loss, exception should be taken in time for the assured to correct it.²

Under an averment of a total loss, a party may recover for a partial loss, in an action of debt on an insurance policy.³ Insurance companies have a right to limit by their policies the time within which an action shall be brought upon them.⁴

In an action on an insurance policy which contains a condition that, in the event of a loss, the company may, at its option, restore the building, it is unnecessary to negative the performance of this condition in the declaration. It is a condition subsequent, and if performed, the company should allege it in defense of the action.⁵

Where one of three partners, who have effected an insurance, afterward, and before a loss, assigns his interest to the other two, without any notice to or consent by the insurers, the two can not recover on the policy, especially where they so declare in their declaration, and the policy forbids such an assignment. An action on a contract must be in the name of the party in whom the legal interest is vested.⁶

¹ *Herron v. Ins. Co.*, 28 Ill. 235.

² *Herron v. Ins. Co.*, 28 Ill. 235; *Ins. Co. v. Whitehill*, 25 Ill. 466; *Ins. Co. v. Staaden*, 26 Ill. 360; *Ins. Co. v. Lewis*, 18 Ill. 553.

³ *Ins. Co. v. Whitehill*, 25 Ill. 466; *Case v. Ins. Co.*, 13 Ill. 676.

⁴ *Ins. Co. v. Whitehill*, 25 Ill. 466.

⁵ *Ins. Co. v. Phelps*, 27 Ill. 71.

⁶ *Dix v. Ins. Co.*, 22 Ill. 272; *Ins. Co. v. Wetmore*, 32 Ill. 221.

In an action on a policy of insurance against fire, the plaintiff must prove that he had an insurable interest in the premises, before he can recover.¹ The plaintiff's interest should be alleged.² A general averment of interest is sufficient.³ The insured must generally have an interest in the property at the time of the loss, to entitle him to recover; but this is not true in every case, for the insured may have assigned his interest with the consent of the insurers, and in that event, the suit should be brought in the name of the insured, for the benefit of his assignee.⁴

No act of the party insured, after the assignment of the policy with the assent of the insurers, can impair the rights of the assignee.⁵ Policies of insurance are within the purview of the 33d section of the Practice Act, and may be read in evidence without proof of their execution, unless denied by plea, properly verified by affidavit.⁶

Where, by the charter of an insurance company, the charter itself is made a part of the contract of insurance, and the insured is made a member of the company, he can not plead ignorance of the provisions of the charter.⁷ It is impossible to give a precedent that will be applicable in every case, as the provisions of insurance policies are varied. Although the policy is often copied into the declaration, it is sufficient to set forth the substance of the instrument, according to the legal effect of the material parts of it on which the plaintiff intends to rely.⁸

Stipulations and conditions indorsed upon the policy are parts of it, and must be set forth so far as they are material.⁹

¹ *Ins. Co. v. Marseilles*, 1 Gilm. 236; *Dix v. Ins. Co.*, 22 Ill. 272; *Mann v. Ins. Co.*, 4 Hill 187; *Carpenter v. Ins. Co.*, 16 Pet. 495; *Birdsey v. Ins. Co.*, 26 Conn. 165; see *G. M. Co. v. Ass. Co.*, 118 Ill. 398.

² 3 Taunt. 513.

³ *Granger v. Ins. Co.*, 5 Wend. 200; *De Forest v. Ins. Co.*, 1 Hall 84.

⁴ *Ins. Co. v. Wetmore*, 32 Ill. 271; *Ins. Co. v. McGowan*, 16 Md. 47; see *Stephens v. Ins. Co.*, 43 Ill. 327.

⁵ *Ins. Co. v. Wetmore*, 32 Ill. 221; *Moore v. Ins. Co.*, 29 Me. 97.

⁶ *Ins. Co. v. Marseilles*, 1 Gilm. 236.

⁷ *Ins. Co. v. Marseilles*, 1 Gilm. 236.

⁸ *Miles v. Sheward*, 8 East 7; *Clarke v. Gray*, 6 East 564.

⁹ *Strong v. Rule*, 3 Bing. 315; *Strong v. Harvey*, 3 Bing. 304.

If the policy has been altered, by consent, after execution, the alteration must be set forth.¹ If the declaration consists of several counts, the policy is not repeated, but reference is made to the first count in the subsequent ones.²

DEFENSES TO THE ACTION OF COVENANT.

Pleas in abatement.—For pleas in abatement, and observations thereon, see *Defenses to an Action*, ante, chapter III.

Pleas in bar.—For general observations upon pleas in bar, see *Defenses to an Action*, ante, chapter III.

No. 155. *Plea of non est factum.*

In the ——— Court.

—Term, 18 —.

C. D.)
ats. } *Covenant.*

A. B.) And the defendant, by G. H., his attorney, comes and defends, the wrong and injury, when, etc., and says, that the said supposed indenture (or “deed,” or “the said writing”) in the said declaration mentioned is not his deed; and of this he puts himself upon the country, etc.

There is, strictly speaking, no general issue in covenant, for the plea of *non est factum* only puts the deed in issue,³ and admits all the other material averments of the declaration.⁴ The defendant must therefore plead specially every matter which it would be necessary to plead in debt on a bond or other specialty. Under the plea of *non est factum*, however, the defendant may on the trial avail himself of a variance in the statement of the deed, either in respect of a misstatement or of the omission of a covenant qualifying the contract; and this although the defendant has agreed to admit on the trial the due execution of the deed; and if the plaintiff omits to state a condition precedent, the defendant may crave oyer, and set out the deed, and demur.⁵ And the plea of *non est factum* is

¹ 2 Chit. Pl. 188.

² *Stiles v. Nokes*, 7 East 505.

³ Chit. Pl. 428; *Longley v. Norvall*, 1 Scam. 389; *Norman v. Wells*, 17 Wend. 136; *Hebbard v. Deplain*, 3 Hill 187; *Dale v. Roosevelt*, 9 Cow. 307; *Granger v. Granger*, 6 Ohio 35.

⁴ *McNeish v. Stewart*, 7 Cow. 474;

Cooper v. Watson, 10 Wend. 302; *Kam v. Sanger*, 14 Johns. 89; *Laraway v. Perkins*, 10 N. Y. (6 Selden) 371; *Reynolds v. Rogers*, 5 Ohio 169.

⁵ 1 Chit. Pl. 428; *Howell v. Richards*, 11 East 639.

such a general issue that notice of set-off, or other matter in bar, may be given with it.¹

In Illinois, this plea does not put the plaintiff upon proof of the execution of the deed, unless verified by affidavit. See the form of the affidavit, *ante*, No. 137. Where several defendants unite in a plea of *non est factum*, if the instrument appears to be the deed of any one of those so uniting in the plea, the issue must be found for the plaintiff.²

See the observations under the plea of *non est factum*, in Debt, *post*, chap. XIII.

A plea of *non infregit conventionem* is bad on demurrer, though it would be aided after verdict;³ at least it is not a good plea where the breach is in the negative,⁴ if it is ever good. But where issue is joined on such a plea, the effect of it is to deny every matter which goes to constitute a breach.⁵ It is not a general issue.⁶

No. 156. *Plea of payment—To action on covenant for payment of money.*

(If pleaded as a first plea, commence as indicated in the observation under this form; if as a second or subsequent plea, commence as follows:) And for a further plea in his behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, (*) that on the said — day of, etc., in the county aforesaid, he did pay to the plaintiff the said sum of — dollars, in the said indenture mentioned: And of this the defendant puts himself upon the country, etc.

The commencement of a *first* plea (except *non est factum*) is, after the title of the court, etc., in this manner: "And the defendant by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have his aforesaid action," etc.

Pleas as to a part, etc.—If there are several breaches of covenant assigned, or if there are several counts, and the plea is not an answer to all of them, it is to be limited accordingly

¹ *Courcier v. Graham*, 1 Ohio 330; *Granger v. Granger*, 6 Ohio 35; see *Longley v. Norvall*, 1 Scam. 389.

² *U. S. v. Linn*, 1 How. (U. S.) 104.

³ 1 Chit. Pl. 428; *Hodgson v. East India Co.*, 8 T. R. 278; Com. Dig. Pleader, 2 V. 5; *Roosevelt v. Fulton*, 7 Cow. 71.

⁴ Bac. Abr. Cov. L.; *Phelps v. Sawyer*, 1 Aik. 150; *Bender v. Fromberger*, 4 Dall. (U. S.) 436; *Roosevelt v. Fulton*, 7 Cow. 71; Story's Pl. 213; 2 Swan's Pr. 750.

⁵ *Roosevelt v. Fulton*, 7 Cow. 71.

⁶ 1 Aik. (Vt.) 170.

in the commencement, thus: "And for a further plea in this behalf, as to the supposed breach of covenant *first* above assigned, the defendant says," etc.; or, "as to so much of the supposed breach of covenant *secondly* above assigned as relates to," etc.; or, "as to the *third* count of the said declaration;" and so on, restricting the plea to the breach or count, or part thereof, which it is designed to answer. (See page 57.) A plea of tender as to a part begins, "And the defendant, by, etc., comes, etc., and as to the supposed breach of covenant *first* above assigned, so far as the same relates to — dollars, parcel of the said sum of — dollars in the said declaration mentioned says that the plaintiff ought not to have his aforesaid action against him, the defendant, to recover any greater damages than the said sum of, etc., (*the sum tendered*,) on occasion of the said supposed breach of covenant in this behalf, because he says," etc.; and concludes by praying "judgment if the plaintiff ought to have his aforesaid action to recover any greater damages than the said sum of, etc., on occasion of the said supposed breach of covenant *first* above assigned," etc. And in any plea concluding with a verification, if the conclusion is written out in full, the prayer of judgment ought to correspond with, and be founded upon, the premises in the plea.

In a plea of set-off to any one of several breaches, the defendant alleges that the sum due to him "exceeds the damages sustained by the plaintiff on occasion of the said supposed breach of covenant first above assigned," and offers to set off to the plaintiff "so much as will be sufficient to satisfy the damages by him sustained on occasion," etc.

Plea to several counts on the same instrument.—Where there are several counts on the same instrument, and the plea is intended to apply to all such counts, it may allege, in the proper case, "that the supposed *indenture* in the said first count of the said declaration mentioned, and the supposed *indenture* in the said second count of the said declaration mentioned, were and are one and the same *indenture*, and not other or different."

No. 157. Plea of performance.

(As in the last precedent, to the asterisk, and then proceed:) that he, the defendant, did (*here state the performance in the words of the covenant if*

in the affirmative and conclude as follows:) according to the form and effect of the said *indenture*, and of the said covenant by the defendant in that behalf made as aforesaid: And of this the defendant puts himself upon the country, etc.

The plea of covenant performed, where it is not sustained, admits nothing more than the plaintiff's right to recover nominal damages.¹

No. 158. Plea, to declaration by apprentice on indenture, that plaintiff deserted defendant's service.

(*First plea, non est factum; second plea as in No. 156, ante, to the asterisk, and then proceed:*) that after the making of the said indenture, and before the expiration of the said term of apprenticeship therein mentioned, to wit, on, etc., the plaintiff wrongfully, and without the license or consent of the defendant, there deserted and left the service of the defendant, and did not at any time afterwards return thereto: And the defendant further says, that he did continually, from the making of the said indenture until the plaintiff so deserted and left the service of the defendant as aforesaid, well and truly keep and perform all things in the said indenture contained, and on his part to be kept and performed within that time; and that during the residue of the said term he was ready and willing to well and truly keep and perform, and would have well and truly kept and performed, all things in the said indenture contained, on his part to be kept and performed during the said residue of the said term, if the plaintiff had not so deserted and left, or had returned to, the service of the defendant. And this he, the defendant, is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action, etc.

For other pleas in covenant, see the special pleas in assumpsit and debt, which may readily be adapted to this form of action. The plaintiff may, as we have seen, plead *non est factum*, and give notice therewith of any special matter of defense.

Pleas in covenant so much depend on the particular facts of each case, that it would not be practicable, in a concise work like this, to give more than a few general forms. For replications, demurrers, etc., see the same subjects in *Defenses to an Action, ante*, chapter III.

¹ *Reed v. Hobbs*, 2 Scam. 297.

CHAPTER VIII.

TROVER.

Trover is a common law action, in common use in England and in many of the states of the Union, to recover the value of personal property wrongfully converted by another to his own use. The plaintiff declares in substance, that on a certain day he was lawfully possessed of a certain chattel, and casually lost the same; that it came into the possession of the defendant by finding; and that the defendant has refused to deliver it to the plaintiff and has converted it to his own use. This action is one form of trespass on the case.

In the distant age when it was first used, the declaration may have narrated accurately the facts of the case; but for a long time the losing and finding have been regarded as mere legal fictions, which the defendant is not at liberty to deny.

Where the action lies.—Trover lies for any species of goods and chattels—as for a horse, a ship, or anything that can be identified; for a chose of action—as a promissory note, bank bill, bond, deed, mortgage; for coins, medals, plants in boxes; for animals valuable as merchandise, whether reclaimed or not; for a dog;¹ for animal *feræ naturæ*, if reclaimed, but otherwise not; and for wild animals which have strayed away without gaining their natural liberty.²

It will lie for the wrongful conversion of valuable papers, or evidences of title to real or personal property, for checks, bills of exchange, drafts, certificates of stock in incorporated companies, securities of any kind, books of record and account, vouchers, etc., and insurance policies.³

¹ *Cummings v. Perham*, 1 Metc. (Mass.) 555.

² *Amory v. Flynn*, 10 Johns. 102; *Leonard v. Belknap*, 47 Vt. 693.

³ *Hays v. Life Ins. Co.*, 125 Ill. 626; *Bank v. Meadowcroft*, 95 Ill. 124; *Garvin v. Wiswell*, 83 Ill. 215; *Canfield v. Monger*, 12 Johns. 347; *Sud-*

Trover will lie for manure lying upon the ground and not incorporated with the soil.¹ It may be maintained for a promissory note which has been paid and by mistake left with the holder.² It lies for a building removed from the freehold, if it had been erected under an agreement that it should be treated as personal property;³ but it will not lie for a fixture.⁴

A trustee with the mere naked title to personal property, may maintain trover for it.⁵ And a finder of goods has a sufficient title for this purpose.⁶ Trover lies by an administrator for a conversion in the lifetime of his intestate;⁷ and against executors for a conversion in the lifetime of their testator.⁸ A mortgagor may maintain the action.⁹

Trover can not be maintained for an article sold under contract of pledge.¹⁰ If one employed to sell goods on commission pawns them the owner may have trover after demand and refusal.¹¹ It lies against a carrier who, by mistake, delivers goods to a wrong person.¹² It lies against different individuals for

bury v. Stearns, 21 Pick. 148; *Lowremore v. Berry*, 19 Ala. 130; *Alexander v. Rundle*, 75 Ill. 85, *Jarvis v. Rogers*, 15 Mass. 389; *Stone v. Clough*, 41 N. H. 290; *Nettleton v. Riggs*, 1 Root (Conn.) 125; *Griswold v. Judd*, 1 Root (Conn.) 221; *Allison v. King*, 25 Iowa 56; *Keeler v. Fassett*, 21 Vt. 539; *Olds v. Board of Trade*, 33 Ill. App. 445.

¹ *Pinkham v. Gear*, 2 N. H. 484; *Stone v. Proctor*, 2 Chip. 116; *Strong v. Doyle*, 110 Mass. 92.

² *Pierce v. Gilson*, 9 Vt. 216; *Graves v. Dudley*, 20 N. Y. (6 Smith) 76.

³ *Davis v. Taylor*, 41 Ill. 405; *Smith v. Benson*, 1 Hill 176; *Dame v. Dame*, 38 N. H. 429; *Parker v. Goddard*, 39 Me. 144; *Pullen v. Bell*, 40 Me. 314.

⁴ *Leman v. Best*, 30 Ill. App. 323; *Prescott v. Wells*, 3 Nevada 82; *Guthrie v. Jones*, 108 Mass. 191; *Darrah v. Baird*, 101 Pa. St. 265.

⁵ *Thompson v. Ford*, 8 Ired. 418; *Coleson v. Blanton*, 3 Hayw. 152; see *Hutton v. Arnett*, 51 Ill. 198.

⁶ *Clark v. Malloney*, 3 Harring. 68; *Cook v. Patterson*, 35 Ala. 102; *McAvoy v. Medina*, 11 Allen (Mass.) 548.

⁷ *Parrott v. Dubignon*, Charl. 261; *Towle v. Lovett*, 6 Mass. 394; *Weiser v. Zeisinger*, 2 Yeates 537; *Pressey v. Powers*, 82 Ill. 125; *Bressler v. Baum*, 42 Ill. App. 190.

⁸ *Decrow v. Mone*, 1 Hayw. 21; *Clark v. Kenan*, 1 Hayw. 308; *Avery v. Moore*, 1 Hayw. 362;

⁹ *Badger v. Mfg. Co.*, 70 Ill. 302; *Parkhurst v. Jacobs*, 17 Mich. 302; *Forth v. Pursley*, 82 Ill. 152.

¹⁰ *Harris v. Thomas*, 37 Ill. App. 517; *Cole v. Dalziel*, 13 Ill. App. 23;

¹¹ *Hyde v. Noble*, 13 N. H. 494; *Carpenter v. Hale*, 8 Gray (Mass.) 157.

¹² *I. C. R. R. v. Parks*, 54 Ill. 294; *R. R. Co. v. Herndon*, 81 Ill. 143.

successive conversions of the same property, but the plaintiff can receive but one satisfaction.¹

Where a party has been induced to sell goods upon a credit, by false and fraudulent representations, he may disaffirm the sale and bring his action of trover or replevin for the recovery of the property obtained by the fraud, or damages for its conversion.² Where crops are raised upon land without license or authority trover may be maintained by the owner of the land for the recovery of the value of such crops.³ A general owner may maintain the action against any person taking the goods out of the possession of his agent.⁴

Trover will lie for stolen property against a purchaser thereof, without a prosecution or conviction of the thief. *Markets overt*, as known to the common law, are unknown in Illinois.⁵ A person who aids a mortgagor of personal property in carrying it away and concealing it will be liable therefor to the mortgagee in an action of trover, even though he was ignorant of the existence of the mortgage.⁶

In trover for the unlawful seizure of goods, the fact that the plaintiff may have reclaimed them, or that they may have been returned, does not go in bar of the action, but merely in mitigation of damages.⁷ Where the cattle of one person break into the enclosure of another and eat and destroy the growing crop of the latter, his remedy is not trover but trespass.⁸ Driving a horse a greater distance than is agreed, or in a different direction, will be conversion.⁹

¹ *Matthews v. Menedger*, 2 McLean 145; see *Bailey v. Godfrey*, 54 Ill. 507.

² *Gray v. St. John*, 35 Ill. 222; see *Gibbs v. Jones*, 46 Ill. 319; *Farwell v. Hanchett*, 120 Ill. 573.

³ *Simpkins v. Rogers*, 15 Ill. 397.

⁴ *Cooper v. Cooper*, 132 Ill. 80. *Lantz v. Drum*, 44 Ill. App. 607; *Gauche v. Mayer*, 27 Ill. 134; *Cannon v. Kinney*, 3 Scam. 9.

⁵ *Newkirk v. Dalton*, 17 Ill. 413; *Hoffman v. Carow*, 22 Wend. 285; *Curtis v. Cane*, 32 Vt. 232; *Haddeu v. Einstman*, 14 Bradw. 443; *Sharp v.*

Parks, 48 Ill. 511; *Rogers v. Huie*, 1 Cal. 429; *Cassidy v. Cattle Co.*, 58 Ill. App. 39.

⁶ *Flanders v. Colby*, 8 Foster (N. H.), 34; *Horne v. Briggs*, 98 Mass. 510; *Sprights v. Hawley*, 39 N. Y. 441.

⁷ *Smith v. Downing*, 6 Ind. 374; *Sparks v. Purdy*, 11 Mo. 219; *Greenfield v. Leavitt*, 17 Pick. 1; *Gibbs v. Chase*, 10 Mass. 125; *Wheelock v. Wheelwright*, 5 Mass. 104; *Barrelett v. Bellgard*, 71 Ill. 280.

⁸ *Smith v. Archer*, 53 Ill. 241.

⁹ *Wheelock v. Wheelwright*, 5 Mass.

If a bailee for a special purpose used the property for another purpose, without leave of the owner, he is liable as for a conversion; yet this should be understood only of such an use as occasions an injury or damage; and the damage or injury, and not the value of the property, would be the measure of the damages to be recovered, if the property is returned. Where no injury is sustained only nominal damages can be recovered. Such an use of property by bailee as is without detriment to the bailor, does not amount to a conversion.¹

Where the defendant received oxen from the plaintiff, to be kept until a particular time, and before the expiration of the time sold a portion of them, it was held that the plaintiff was entitled to recover the value of the oxen at the time of their conversion by the defendant.² Trover will lie in case of irregularities in disposing of property contrary to the statute by the landlord after distress.³

By statute in Illinois, trover may be maintained for money or other valuable thing lost at gaming.⁴ Where trespass *de bonis asportatis* will lie, trover may be sustained.⁵ One trespasser or wrongdoer can not maintain trover against the other.⁶ Trover will lie against one partner who converts to his own use property which has been entrusted to his firm for manufacture.⁷

A wife is jointly liable with her husband for a tort; and trover lies against both for a joint conversion.⁸ The possession *bona fide* of goods gives a sufficient right to enable the possessor

104; *Homer v. Thwing*, 3 Pick. 392; *Campbell v. Stakes*, 2 Wend. 137; *Lucas v. Trumbull*, 15 Gray 306; *Perham v. Coney*, 117 Mass. 102; *Fail v. McArthur*, 31 Ala. 26.

¹ *Johnson v. Weedman*, 4 Scam. 495; *Campbell v. Stakes*, 2 Wend. 137; *Crocker v. Gullifer*, 44 Me. 491; *Pillsbury v. Webb*, 33 Barb. 213; *Hart v. Skinner*, 16 Vt. 138; *Green v. Sperry*, 16 Vt. 390.

² *Otter v. Williams*, 21 Ill. 118; *Thrall v. Lathrop*, 30 Vt. 307.

³ *Tripp v. Grouner*, 60 Ill. 474; *Shutz v. Baker*, 38 Ill. App. 349.

⁴ 1 Starr & Curtis 792; Rev. Stat. (1893), 492; Rev. Stat. (1895), 535; *Richardson v. Kelly*, 85 Ill. 491; *Winchester v. Rounds*, 55 Ill. 451.

⁵ *Haines v. Briggs*, 9 Ark. 46; *Pierce v. Benjamin*, 14 Pick. 356; *Drew v. Spaulding*, 45 N. H. 472; *Meade v. Smith*, 16 Conn. 45.

⁶ *Turley v. Tucker*, 6 Mo. 583; *R. Co. v. Ellsey*, 85 Pa. St. 283.

⁷ *Stevens v. Fawcett*, 24 Ill. 483.

⁸ *Davis v. Taylor*, 41 Ill. 405; *Hutton v. Arnett*, 51 Ill. 198.

to maintain trover against a wrongdoer.¹ If the possession of property is fraudulently obtained from a bailee by the general owner, the bailee may maintain trover for his property against either the owner or his subsequent vendee.² A person owning property mingled with that of another may, on its conversion, maintain trover.³

By tenant in common.—Trover can not be supported by one joint tenant, tenant in common or co-parcener against his co-tenant for a thing still in the latter's possession, because the possession of one is the possession of both;⁴ but if the co-tenant destroys⁵ or sells the property,⁶ or assumes exclusive control over it,⁷ the other may maintain this action against him.

By statute, in Illinois, a joint tenant, tenant in common or coparcener may have his action of trespass or trover against his co-tenant, if the latter "shall assume and exercise exclusive ownership over, or take away, destroy or lessen in value, or otherwise injure or abuse" the common property.⁸ Under this statute it has been held that trover may be maintained for the conversion of a promissory note, or the proceeds thereof, although the plaintiff and defendant were jointly interested in the note.⁹

Against an officer.—Trover lies against an officer for goods sold on execution which are by law exempt from such sale;¹⁰

¹ *Coffin v. Anderson*, 4 Blackf. 395; *Lamb v. Clark*, 30 Vt. 347; *Cook v. Patterson*, 35 Ala. 102; *Vining v. Baker*, 53 Me. 544; *Watt v. Seafeld*, 76 Ill. 261; see *Hollenbeck v. Todd*, 19 Ill. App. 452.

² *McConnel v. Maxwell*, 3 Blackf. 419; *Hyde v. Noble*, 13 N. H. 494.

³ *Jackson v. Anderson*, 4 Taunt. 24; *Whitehouse v. Frost*, 12 East. 614; *Bank v. Meadowcraft*, 95 Ill. 124.

⁴ 2 Saund. 47; *St. John v. Standring*, 2 Johns. 468; *Mersereau v. Norton*, 15 Johns. 179.

⁵ *Martyn v. Knoll*, 8 T. R. 146; *Wilbraham v. Snow*, 2 Saund. 47, h; *Goel v. Morse*, 126 Mass. 480; *Weld v. Oliver*, 21 Pick. 559; *Delaney v. Root*, 99 Mass. 546.

⁶ *Case v. Hart*, 11 Ohio 364; *Wilson v. Reed*, 3 Johns. 175; *Needham v. Hill*, 127 Mass. 123; *Heath v. Hubbard*, 4 East 121; 1 Chit. Pl. 144; *White v. Osborn*, 21 Wend. 76.

⁷ *Wheeler v. Wheeler*, 33 Me. 347; *Webb v. Mann*, 3 Mich. 139; *Perminster v. Kelly*, 18 Ala. 716.

⁸ 2 Starr & Curtis 1376; Rev. Stat. (1893), 882; Rev. Stat. (1895), 932; see *Benjamin v. Stremple*, 13 Ill. 466; *Boyle v. Levings*, 28 Ill. 314; *Swartwout v. Evans*, 37 Ill. 442; *Carter v. Wingard*, 47 Ill. App. 296.

⁹ *Boyle v. Levings*, 28 Ill. 314.

¹⁰ *Dartn v. Stone*, 4 Cush. 359; *Stephens v. Lawson*, 7 Blackf. 275; *McCoy v. Brennan*, 61 Mich. 362; *Howard v. Cooper*, 45 N. H. 339;

or against an officer who seizes property by virtue of process and sells it without notice;¹ or where he seizes the property of one person on a writ of execution against another.² The removal and detention of the personal property of a stranger, by an officer acting by the direction of the party, is a conversion by both aside from any demand and refusal;³ but a judgment creditor is not liable for a wrongful seizure or sale by the sheriff on the execution, which he did not direct or assent to.⁴

Where the sheriff sells the property of a partnership, as the individual property of one partner, on a writ of execution against such partner individually, he is liable in trover to the other partner therefor; and the plaintiff is entitled to recover the value of his individual share in the property so sold without regard to the state of the partnership accounts.⁵ Trespass may also be maintained in such case.⁶ Trover lies against the purchaser and constable for the landlord's share of a crop seized and sold on execution against the tenant.⁷

By an officer.—A sheriff or constable who has seized goods on execution or attachment, has a special property in them, and may maintain trover for them;⁸ but a custodian appointed by such officer can not maintain the action.⁹

Conversion the gist of the action—What constitutes.—Conversion consists in any tortious act by which the defend-

Sanborn v. Hamilton, 18 Vt. 589;
Belon v. Robbins, 76 Wis. 416.

¹ *Wright v. Spencer*, 1 Stew. 576;
Perkins v. Johnson, 3 N. H. 144.

² *Jamison v. Hendricks*, 2 Blackf. 94; *Sanborn v. Hamilton*, 18 Vt. 590; *McFarland v. Farmer*, 42 N. H. 386; *Locke v. Garrett*, 16 Ala. 698; *Hanchett v. Williams*, 24 Ill. App. 56; *Duncan v. Stone*, 45 Vt. 118; *Robinson v. McDonald*, 2 Geo. 116.

³ *Calkins v. Lockwood*, 17 Conn. 154; *Christopher v. Covington*, 2 Mon. 359; *Libby v. Soule*, 1 Shep. 310; *Hanchett v. Williams*, 24 Ill. App. 56; *Duncan v. Stone*, 45 Vt. 118; *Robinson v. McDonald*, 2 Geo. 116; *Burgin v. Burgin*, 1 Ired. 453.

⁴ *Ayerill v. Williams*, 1 Denio 501;
Mulheisen v. Lane, 82 Ill. 117.

⁵ *Walsh v. Adams*, 3 Denio (N. Y.), 125.

⁶ *Smyth v. Tankersley*, 20 Ala. 212;
Markley v. Rand, 12 Cal. 275.

⁷ *Case v. Hart*, 11 Ohio 364; *Fallman v. Turck*, 26 Barb. 167; *Champney v. Smith*, 15 Gray 512; *Horne v. Briggs*, 98 Mass. 510; *Mead v. Thompson*, 78 Ill. 62.

⁸ *Gardner v. Willis*, Breese 368; *Davidson v. Waldron*, 31 Ill. 120; *Mulheisen v. Lane*, 82 Ill. 117; *Richardson v. Rardin*, 88 Ill. 124.

⁹ *Ludden v. Leavitt*, 9 Mass. 104; *Warren v. Leland*, 9 Mass. 265; see *Common v. Morse*, 14 Mass. 217.

ant deprives the plaintiff of his goods, either wholly or for a time.¹ Cutting growing corn, and carrying it away, will be a conversion of it sufficient to sustain trover.²

There may be a conversion by the wrongful taking of personal property; by some illegal assumption of ownership; by illegally using or misusing property; or by its wrongful detention. If a person fraudulently sues out a writ of replevin, and thereby obtains possession of property, and then dismisses his suit, it will be an illegal taking and assumption of ownership of the property, and a sufficient proof of conversion, rendering a demand unnecessary to sustain an action of trover.³ The wrongful assumption of the property in, or the right to dispose of the goods, may be a conversion in itself, and render unnecessary a demand and refusal.⁴ If a person has a lien on property for a special purpose, and applies it to another purpose, it is a waiver of the lien, and a conversion.⁵ And if a person, having a lien on property, upon being requested to deliver it up, claims to retain it on a different ground from that upon which he rests his lien, he waives such lien,⁶ as well as any tender of charges.⁷

Where one of two joint owners of personal property demands of the other, not the joint use and possession, as joint owner, but the property as sole owner, the latter is at entire liberty to disregard such a demand. To make a demand available under such circumstances, the party making it should demand the equal enjoyment of the property as joint owner.⁸

¹ 2 Stark. Ev. 842; 3 Steph. N. P. 2704; *Ins. Co. v. Cochran*, 27 Ala. 228; *N. T. Co. v. Sellick*, 52 Ill. 249; *Tran. Co. v. Mallory*, 157 Ill. 554.

² *Pierrepoint v. Barnard*, 5 Barb. 364; *Nelson v. Burt*, 15 Mass. 204.

³ *Bruner v. Dyball*, 42 Ill. 34; see *Ogden v. Lucas*, 48 Ill. 492; *R. R. Co. v. Trenton Car Co.*, 3 Vroom 517.

⁴ *McComlie v. Davies*, 6 East 538; *Reynolds v. Shuler*, 5 Cowen 323; *Bissel v. Drake*, 19 Johns. 66; *Rawson v. Tuel*, 47 Maine 596; 1 Chit. Pl. 141.

⁵ *Coffin v. Anderson*, 4 Blackf. 396; *Clark v. Rideout*, 39 N. H. 238; *Thrall v. Lathrop*, 30 Vt. 307; see *Johnson v. Woodman*, 4 Scam. 495.

⁶ *Boardman v. Sill*, 1 Camp. 410; 3 Steph. N. P. 2694; *West v. Tupper*, 1 Bailey (S. C.) 193; *Benior v. Pacquin*, 40 Vt. 199.

⁷ *Boardman v. Sill*, 1 Camp. 410; 2 M. & S. 298; *West v. Tupper*, 1 Bailey (S. C.) 193; 3 Steph. N. P. 2681; 11 Rich. Law (S. C.) 267; 3 H. & N. 931.

⁸ *Swartwout v. Evans*, 37 Ill. 442.

An adulteration of liquor by a carrier, or his servant, will be a conversion of it.¹ The fraudulent mixing, by one person, of his own goods with the goods belonging to another, in such a manner that the property of each can no longer be distinguished, constitutes a confusion of goods, if the goods mixed are of unequal value, and the innocent party is entitled to the whole, and may maintain trover for them against a purchaser in good faith.²

Possession of property, with a claim of title adverse to that of the true owner, is sufficient evidence of conversion.³ When goods or choses in action have been pledged to secure the payment of a debt, before the owner can reinvest himself with the right to resume possession of the property, he must pay the debt or at least make a sufficient tender.⁴ A refusal by the possessor to deliver goods to the owner, on pretense that they belong to another, is evidence of a conversion.⁵ If a bailee gives a sufficient reason for not delivering the goods on a demand, his refusal so to deliver will not amount to a conversion.⁶ A common carrier is liable in trover for losing goods,⁷ but a mere delay in delivery by a carrier is not a conversion of the property.⁸

Parties may be sued in action of trover, though there was no joint conversion in fact. A joint conversion may be implied in law, by the consent of a partner to the acts of his copartner.⁹

Demand—Whether necessary.—Proof of a demand and

¹ *Dench v. Walker*, 14 Mass. 500; *Young v. Mason*, 8 Pick. 551.

² *Bank v. Meadowcroft*, 95 Ill. 124; *Haddix v. Einstman*, 14 Bradw. 443; *Bank v. McCrea*, 106 Ill. 281.

³ *Maxwell v. Harrison*, 8 Geo. 61; see *N. T. Co. v. Sellick*, 52 Ill. 249.

⁴ *Henry v. Eddy*, 34 Ill. 508; *Picquet v. McKay*, 2 Blackf. 465.

⁵ *Coffin v. Anderson*, 2 Blackf. 395; *Munger v. Hess*, 28 Barb. 75; *Buel v. Pumphrey*, 2 Md. 261; *Clark v. Hale*, 34 Conn. 398; *Campen v. Bemis*, 35 Ill. App. 37.

⁶ *Underwood v. Latham*, 1 Ind. 276; *Briggs v. R. R. Co.*, 28 Barb. 515.

⁷ *Bank v. Leavitt*, 17 Pick. 1; *Paskard v. Getman*, 4 Wend. 613; *R. R. Co. v. Parks*, 54 Ill. 294; *Ry. Co. v. Gilvin*, 81 Ill. 511; *Stone v. Ry. Co.*, 9 Bradw. 48; *Ry. Co. v. McComas*, 33 Ill. 185; *M. D. Co. v. Smith*, 76 Ill. 542; *Forbes v. R. R. Co.*, 133 Mass. 154; *Dow v. Bank*, 91 U. S. 618.

⁸ *Briggs v. R. R. Co.*, 28 Barb. 515.

⁹ *Bane v. Detrick*, 52 Ill. 20.

refusal is necessary, in trover, when the defendant comes lawfully into possession, and the plaintiff is not prepared to prove a distinct and actual conversion. But demand and refusal are unnecessary, if the taking was tortious, or if an actual conversion was shown.¹ The demand and refusal where necessary are conclusive evidence of conversion, if not explained.²

Essentials to support the action.—In trover, the plaintiff must recover on the strength of his own title, without regard to the weakness of that of his adversary. It is a possessory action, and in order to maintain it, the plaintiff must show in himself either a general or special property in the thing alleged to have been converted. It is essential that the plaintiff, at the time of the conversion, should not have only the right of property in the chattel, but also the right to the immediate possession.

His right to possession must be immediate, absolute and unconditional, and not dependent on some act to be done by him. It is not enough that he has a mere right of action, or a right to take possession at some future day.³ The plaintiff must prove a conversion of the property by the defendant at a time when the right of possession existed in the plaintiff;⁴ but it is not necessary that the plaintiff's interest in the goods should have continued until the commencement of the suit;⁵ and to show a conversion, it must be made to

¹ *Hays v. Ins. Co.*, 125 Ill. 626; *Howitt v. Estelle*, 92 Ill. 218; 1 Chit. Pl. 141; *Trans. Co. v. Mallory*, 157 Ill. 554; *Bank v. Dunbar*, 118 Ill. 625; *Metcalfe v. Deckman*, 43 Ill. App. 284.

² *Bank v. Strang*, 28 Bradw. 375; *Bruner v. Dyball*, 42 Ill. 34; *Roush v. Washburn*, 88 Ill. 215; *Race v. Chandler*, 15 Bradw. 532; *Swartwout v. Evans*, 37 Ill. 442; *Forth v. Pursley*, 82 Ill. 152; *Mulheisen v. Lane*, 82 Ill. 117; *Alexander v. Rundle*, 75 Ill. 85; *Bertholf v. Quinlan*, 68 Ill. 297; *Hardy v. Keeler*, 56 Ill. 152; see *Trans. Co. v. Mallory*, 157 Ill. 554.

³ *Frink v. Pratt*, 130 Ill. 327; *Da-*

vidson v. Waldron, 31 Ill. 120; *Montgomery v. Brush*, 121 Ill. 513; *Blain v. Foster*, 33 Ill. App. 297; *Poppers v. Peterson*, 33 Ill. App. 384; *Beckman v. McKay*, 14 Cal. 250; *Stephenson v. Little*, 10 Mich. 433; *Grier v. Stout*, 2 Bradw. 602; *Bricker v. Hughes*, 4 Ind. 146; *Trans. Co. v. Mallory*, 157 Ill. 554.

⁴ *Bertholf v. Quinlan*, 68 Ill. 297; *Presley v. Powers*, 82 Ill. 125; *Owens v. Weedman*, 82 Ill. 409; *Davidson v. Waldron*, 31 Ill. 120; *Forth v. Pursley*, 82 Ill. 152; *Hayes v. Ins. Co.*, 125 Ill. 626.

⁵ *Barton v. Dunning*, 6 Blackf. 291; *Matteawan v. Bentley*, 13 Barb. 641.

appear that the defendant has had actual or virtual possession of the goods.¹

Judgment.—In an action of trover by the bailee of a chattel, or one having a special property therein, against the real owner, the plaintiff can recover his special property only; but if the action is against a stranger, the bailee is entitled to recover the full value of the article, and he holds the sum recovered, less the amount of his special interest, in trust for the general owner, to whom he is responsible.²

The judgment for the plaintiff, in an action of trover, is for the full value of the property at the time of the conversion,³ and for interest from that time.⁴ When property is restored, not depreciated in value, it goes in mitigation of damages.⁵

COMMENCEMENT OF THE ACTION.

An action of trover is commenced, like most other actions at law, by suing out a summons, or *capias*; and in certain cases security for costs is required.

The declaration.—The declaration in this action alleges that the plaintiff was possessed of certain goods (describing them), as of his own property, and that they came to the possession of the defendant by *finding*, and that he converted them to his own use. The *conversion* is the gist of the action. The finding is not traversable,⁶ and it would probably be sufficient to allege generally that the goods came to the hands of the defendant.⁷

¹ *Taylor v. Horral*, 4 Blackf. 317; *Kelsey v. Griswold*, 6 Barb. 436.

² *Benjamin v. Stremple*, 13 Ill. 466; *Lyle v. Barker*, 5 Binn. 457; *Ingersoll v. Van Boklin*, 7 Cow. 670; *White v. Webb*, 15 Conn. 302; *Chamberlain v. Shaw*, 18 Pick. 278; *Ayer v. Bartlett*, 9 Pick. 156; *Byron v. Chapin*, 11 Mass. 308; *Smith v. James*, 7 Cow. 329.

³ *Keaggy v. Hite*, 12 Ill. 99; *Bank v. Leavitt*, 17 Pick. 1; *Winslow v. Norton*, 29 Me. 419; *Tripp v. Grouner*, 60 Ill. 474.

⁴ *Keaggy v. Hite*, 12 Ill. 99; *Sturges v. Keith*, 57 Ill. 451; *Otter v.*

Williams, 21 Ill. 118; *Winslow v. Norton*, 29 Me. 419; *Kennedy v. Whitwell*, 4 Pick. 466; *Ewing v. Blount*, 20 Ala. 694; 3 Steph. N. P. 2711; *Thrall v. Lathrop*, 30 Vt. 307; *Polk v. Allen*, 19 Mo. 467; *Funk v. Dillon*, 21 Mo. 294.

⁵ *Kennedy v. Whitwell*, 4 Pick. 466. *Powers v. Bassford*, 19 How. (N. Y.) 309; *Yale v. Saunders*, 16 Vt. 243; *Gibbs v. Chase*, 10 Mass. 128; *Sparks v. Purdy*, 11 Mo. 219; *Wheelock v. Wheelright*, 5 Mass. 104; *Smith v. Downing*, 6 Ind. 374.

⁶ Chit. Pl. 161.

⁷ Oliver's Precedents, 467.

In actions for injuring, taking away or converting goods, it is in general necessary that the *species*, the *quantity* or *number*, and the *value* of the goods should be alleged. A general description of the property according to common acceptance is sufficient.¹ Care should be taken not to include in the declaration articles of property which can not be recovered in this form of action, lest after a general verdict for the full amount claimed, and judgment thereon, such judgment should be reversed on error.²

If the plaintiff desires to claim for special damage, that is, damage not necessarily consequent to the conversion, he must charge such special damage in his declaration.³ A declaration in trover will be sustained, although no amount is expressed in the *ad damnum* clause.⁴ But in Maryland it has been decided that damages must be claimed, or the judgment will not be supported in the court of appeals.⁵ Counts in case and trover may be joined in the same action.⁶ And by statute in Illinois, counts in trover and replevin may be joined.⁷

No. 159. General form of declaration in trover.

In the ——— Court.

— Term, 18—.

STATE OF ILLINOIS, }
County of ———, } sct.

A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass on the case: For that, whereas, the plaintiff, on, etc., in the county aforesaid, was lawfully possessed, as of his own property, of certain goods and chattels, to-wit, (*here describe the property*), of the value of ——— dollars; and being so possessed thereof, the plaintiff afterwards, to wit, on the day aforesaid, there casually lost the said goods and chattels out of his posses-

¹ *Taylor v. Wells*, 2 Saund. 74, note; *Colebrook v. Merrill*, 46 N. H. 160; *Stinchfield v. Twaddle*, 81 Me. 273; *Edgerly v. Emerson*, 23 N. H. 555; *Ball v. Patterson*, 1 Cranch 607; *Heddy v. Fuller*, 1 Blackf. (Ind.) 51; *Vanauken v. Wickham*, 5 N. J. L. 509.

² *Clement v. Brown*, 30 Ill. 43.

³ *Moon v. Raphael*, 2 Bing. (N. C.) 310; *Davis v. Oswell*, 7 C. & P. 804; *Barrelett v. Bellgard*, 71 Ill. 280.

⁴ *Mattingly v. Darwill*, 23 Ill. 618;

see *Hargrave v. Penrod*, Breese 401; *Ryan v. Hurley*, 119 Ind. 115.

⁵ *Stirling v. Garrittee*, 18 Md. 468.

⁶ 1 Chit. Pl. 181; *Ayer v. Bartlett*, 9 Pick. 156; *Horsley v. Branch*, 1 Humph. 199; *Wilkinson v. Moseley*, 30 Ala. 562; *Hayes v. Life Ins. Co.*, 125 Ill. 626.

⁷ Rev. Stat. (1893), 1174; Rev. Stat. (1895), 1258; 2 Starr & Curtis 2015; *McGavock v. Chamberlain*, 20 Ill. 219.

sion, and the same afterwards, to wit, on the same day, there came to the possession of the defendant by finding: Yet the defendant, well knowing the said goods and chattels to be the property of the plaintiff, has not as yet delivered the same, or any or either of them, or any part thereof, to the plaintiff, although often thereto requested, but has hitherto refused so to do, and afterwards, to wit, on the same day, there converted and disposed of the said goods and chattels to his own use: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

In trespass for taking “goods, chattels and *effects*,” it has been held the plaintiff may recover the value of *severed* fixtures, but not so if for taking “goods and chattels” only.¹ If the action is brought for a note, bill of exchange, bond or other writing, describe it by its date, amount, the time when payable, parties, etc., as nearly as may be.² But it seems it is not necessary to state the date of a writing.³

In trover for a note, an omission to allege its value can only be reached by special demurrer.⁴ The property should be described to be of some value.⁵

No. 160. By an executor, for a conversion in the lifetime of the testator.

(*Title of court, etc., as in last precedent.*) A. B., plaintiff, executor of the last will and testament of E. F., deceased, complains of C. D., defendant, of a plea of trespass on the case: For that whereas the said E. F. in his lifetime, to wit, on, etc., in, etc., was lawfully possessed, as of his own property, of divers goods and chattels, to wit, (*describe the property*), of the value of — dollars; and being so possessed thereof, he, the said E. F., in his lifetime, afterwards, to wit, on the day aforesaid, there casually lost the said goods and chattels out of his possession, and the same afterwards, and in the lifetime of the said E. F., to wit, on the same day aforesaid, there came to the possession of the defendant by finding: Yet the defendant, well knowing the said goods and chattels to be the property of the said E. F., in his lifetime, and of right to belong to him, and to the plaintiff, as executor as aforesaid, after the decease of the said E. F., did not deliver the said goods and chattels, or any or either of them, or any part thereof, to the said E. F., in his lifetime, nor has the defendant as yet delivered the same,

¹ 2 Chit. Pl. 835, n; 4 B. & A. 206.

² South. 211; *Taylor v. Morgan*, 3 Watts. 333; see 2 Chit. Pl. 835.

³ 2 Chit. Pl. 835, n.

⁴ *Fry v. Baxter*, 10 Mo. 302; see *Taylor v. Morgan*, 3 Watts, 333; *Bissell v. Drake*, 19 Johns. 66; *Bank v.*

Neilson, 15 N. J. L. 337; *Pierson v. Townsend*, 2 Hill (N. Y.) 550.

⁵ *Hixon v. Pixley*, 15 Nev. 475; but see 2 Bouv. L. Dict. 606; *Connoss v. Meir*, 2 E. D. Smith (N. Y.) 314; *Richardson v. Hall*, 21 Md. 399; *Kuhland v. Sedgwick*, 17 Cal. 123; *Ryan v. Hurley*, 119 Ind. 115.

or any or either of them, or any part thereof, to the plaintiff, executor as aforesaid, since the death of the said E. F. (although often requested so to do); (*) and the defendant afterwards, and in the lifetime of the said E. F., to wit, on the same day aforesaid, there converted and disposed of the said goods and chattels to his own use: To the damage of the plaintiff, as executor as aforesaid, of — dollars, and therefore he brings his suit, etc. And the plaintiff brings into the court here the letters testamentary to him granted, whereby it fully appears to the court here that the plaintiff is executor of the said last will and testament of the said E. F., deceased, and has the execution thereof, etc.

(If the suit is by an administrator, commence as in No. 35a, ante, page 90, and make profert of letters as in same form.)

If the trover was in the lifetime of the testator or intestate, but the conversion after his death, then in lieu of the clause immediately following the asterisk in the above form insert the words:

And the defendant afterwards, and after the death of the said E. F., to wit, on, etc., there converted and disposed of the said goods and chattels to his own use.

If the action is brought by an administrator in that capacity, the property may be alleged in the intestate, whether the conversion was before or after his death, if before administration granted; but if any one takes property belonging to the estate *after* administration granted, the administrator may declare on his own possession.¹

If the trover was first and the administration afterwards, the plaintiff may declare specially, or lay trover after the administration;² for an executor has a constructive possession of the goods from the time of the testator's death.³ The property of the goods draws to it a possession in law, and therefore an executor may declare on his own possession "as executor," though in fact he never has had possession.⁴ In trover by an administrator, where the property is laid in the intestate, evidence is not admissible, under the general issue, to dispute the plaintiff's representative character; but it is otherwise as to a count on the plaintiff's possession.⁵

¹ Oliver's Precedents 467.

² 2 Chit. Pl. 840, n.

² Comb. 304.

⁵ 2 Chit. Pl. 839; 1 Chit. Pl. 489.

³ *Smith v. Milles*, 1 T. R. 480; Ol. Prec. 470.

DEFENSES IN TROVER.

For pleas in abatement, see chapter III, "Defenses to an Action," which, with very little variation, can be made applicable to this form of action.

Pleas in bar.—In trover the general issue is "not guilty," and it is not usual in this action to plead any other plea, except the statute of limitations, and a release.¹ The defendant may, however, plead specially anything which, admitting the plaintiff had once a cause of action, goes to discharge it. Thus a release may be pleaded, as before observed; accord and satisfaction; arbitrament and award; and a former recovery for the same conversion.² Pleas attempting to *justify* are inconsistent with the admission of a conversion, and amount to the general issue.³

A precedent is given in Chitty's Pleading, Vol. 3, page 1040, of a plea to an action of trover, brought by an administrator, that the grant of administration was void, because not made by the proper authority.

The plaintiff is compelled to prove his property, general or special, in the goods; possession, actual or constructive; and such an unlawful disposition of them by the defendant as amounts to a conversion. Any evidence to rebut this proof, in any particular, may be given under the general issue.⁴

A plea in trover, that the goods have been consigned by the plaintiff to the defendant on commission, and the latter had sold them pursuant to the plaintiff's order, is bad, as amounting to the general issue.⁵ So a plea to an action of trover for a buggy, that it had been delivered to the defendant upon a contract of bailment for hire, and that it had been destroyed by accident, without the fault of the defendant, is bad for the same reason.⁶

A plea in trover for bank notes, that the defendant, as

¹ 1 Chit. Pl. 436; see *Kennedy v. Strong*, 10 Johns. 291.

² 1 Tidd's Pr. 598; *Andrews' Steph. Pl.* 88, note.

³ *Andrews' Steph. Pl.* 88, note; but see 1 Chit. Pl. 435.

⁴ *Andrews' Steph. Pl.* 88, note;

Briggs v. Brown, 3 Hill 87; *Beckman v. McKay*, 14 Cal. 250; see *Davidson v. Waldron*, 31 Ill. 120.

⁵ *Kennedy v. Strong*, 10 Johns. 288.

⁶ *Carter v. Tams*, Dist. Court, Phila. 1836.

cashier of a bank, received them from the holder on special deposit, is bad; and no special plea in bar of the action can be good, unless it confesses and avoids the conversion.¹ The right of the plaintiff to maintain trover is put in issue by the plea of "not guilty;"² and under this plea the defendant may show a right of entry for rent in arrear, under which he entered, distrained and sold.³

In this action, a plea of property in a third person is bad.⁴ Evidence of such matter may be given under the issue.⁵ The plea of "not guilty" puts in issue not merely the conversion in fact, but the wrongful conversion.⁶

In trover, upon the general issue, the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary.⁷ It seems that where a special plea is pleaded which only amounts to the general issue, the exception may be taken either by motion⁸ or by special demurrer.⁹

Accounts can not be adjusted, nor a set-off be allowed, in an action of trover.¹⁰ It has been held that a defendant can plead to an action of trover, in justification, that he had a special property in the goods, or a lien thereon,¹¹ but the weight of authority is against it.

No. 161. Plea of not guilty—General issue.

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } Trover.

A. B. } And the defendant, by E. F., his attorney, comes and defends

¹ *Coffin v. Anderson*, 4 Blackf. 395.

² *Coffin v. Anderson*, 4 Blackf. 396; *Hurst v. Cook*, 19 Wend. 462.

³ *Briggs v. Brown*, 3 Hill. 87; see Gould's Pl. 319.

⁴ *Hurst v. Cook*, 19 Wend. 469; *Duncan v. Speer*, 11 Wend. 54; *Harker v. Dement*, 9 Gill. 7.

⁵ *Schemerhorn v. Van Valkenburg*, 11 Johns. 529; *Duncan v. Speer*, 11 Wend. 54; see Gould's Pl. 319.

⁶ *Young v. Cooper*, 6 Exch. 259; *Knyaston v. Crouch*, 14 M. W. 266.

⁷ *Bricker v. Hughes*, 4 Ind. 146; *Davidson v. Waldron*, 31 Ill. 120;

Stephenson v. Little, 10 Mich. 433; *Beckman v. McKay*, 14 Cal. 250.

⁸ *Jackson v. Hobson*, 4 Scam. 411.

⁹ *Kennedy v. Strong*, 10 Johns. 389; *Abrams v. Pomeroy*, 13 Ill. 133; *Klein v. Currier*, 14 Ill. 237; *Jackson v. Hobson*, 4 Scam. 411; *Curtiss v. Martin*, 20 Ill. 557; *City v. Warfield*, 25 Ill. 317; *Briggs v. Brown*, 3 Hill (N. Y.) 87; *Turner v. Waldo*, 40 Vt. 51; *Fenlason v. Rackeliff*, 50 Me. 362.

¹⁰ *Keaggy v. Hite*, 12 Ill. 99; see 2 Cain's Cas. 200.

¹¹ *Tidd's N. P.* 330; 2 Bing. 755.

the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against him: And of this the defendant puts himself upon the country, etc.

What plaintiff must prove.—Under the plea of “not guilty” the plaintiff must prove: (1) Property in himself, either general or special,¹ and a right of possession at the time of the conversion. (2) A conversion of the thing by the defendant to his own use; and whether the defendant originally came to the possession of the thing by right or by wrong, is not material. If by right, a demand and refusal must be proved, unless there was an actual conversion.² (3) The value of the goods at the time of the conversion.

Damages.—In trover, if the plaintiff recover, he is entitled to the full value of the property converted, with interest from the time of the conversion.³ The measure of damages in trover for a note is the amount due on its face, unless it is proved to be of less value,⁴ and interest from its maturity to the time of conversion, and interest on the aggregate from that time to the time of the verdict.⁵

The measure of damages for the conversion of a paper of no intrinsic value in itself, but evidence of title to a valuable right, interest or property, is the value of such right or interest, with interest from the date of conversion to time of trial.⁶

For pleas of the statute of limitations, release, accord and satisfaction, etc., and for demurrers, see the same subjects in “Assumpsit” and “Defenses to an Action.”

¹ *Pyne v. Dor*, 1 Term. 56; *Wilbraham v. Snow*, 2 Saund. 47, a; *Picquet v. McKay*, 2 Blackf. 465; *Odiorne v. Colley*, 2 N. H. 66; *Davidson v. Waldron*, 31 Ill. 120.

² *Stevens v. Low*, 2 Hill. 132; see *Bruner v. Dyball*, 42 Ill. 34.

³ *Keaggy v. Hite*, 12 Ill. 99; *Otter v. Williams*, 21 Ill. 118; *Baldwin v. Bradley*, 69 Ill. 32; *Sturges v. Keith*, 57 Ill. 451; *Forbes v. R. R. Co.*, 133 Mass. 154; 2 Greenl. Ev., Sec. 276, 649.

⁴ *Ingalls v. Lord*, 1 Cowen 240.

⁵ *St. John v. O'Connell*, 7 Porter (Ala.) 466; see, also, *Romig v. Romig*, 2 Rawle 241; *Bank v. Mas. Hall*, 62 Ga. 271; but see *Benjamin v. Bank*, 63 Wis. 470.

⁶ *Am. Ex. Co. v. Parsons*, 44 Ill. 312; *Hayes v. Ins. Co.*, 125 Ill. 626; *Olds v. Bd. Trade*, 33 Ill. App. 445; *Bank v. Strang*, 28 Ill. App. 325; *Sutherland on Dam.* 520.

CHAPTER IX.

REPLEVIN.

The institution of the action of replevin is ascribed to Glanvil, Chief Justice to Henry II., and it was originally the peculiar and exclusive remedy in cases of wrongful distress for rent, or of cattle *damage feasant*. The object was to prevent the beasts of the plough, cattle, and other goods of the tenant in arrear from being unjustly or excessively distrained by the landlord, lest, as Littleton observes, "the husbandry of the realm and men's other trades might thereby be overthrown or hindered." At the common law, a distress was considered merely as a pledge or security for the rent, or damages, or for service due from the tenant to his superior lord, and a means of enforcing payment or performance thereof. The property could not be sold or disposed of by the distrainor, but he was compelled to hold it as a pledge until payment or other satisfaction was made. The law was altered in this respect, in England, by statute 2 William and Mary, (A. D. 1691) which authorized the distrainor, with the assistance of the sheriff, to have the distress appraised by competent appraisers, and sold for the highest price which it would bring, unless regularly replevied by the tenant or owner within five days after seizure. There were two ways in which a distress could be replevied, one according to the common law, and the other by statute. The common law allowed the owner a writ of *replegiari facias*, which was sued out of the chancery, and directed to the sheriff of the county in which the distress was taken, commanding him to redeliver it to the owner, and afterwards to do justice in respect of the matter in dispute, in his county court.

The statute of Marlbridge, 52 Henry III. (A. D. 1268), provided that if the beasts of any man were taken and wrongfully withheld, the sheriff should, upon complaint made to him thereof, deliver them to the owner "without let or gainsaying

of him who took the beasts." The owner was required to first give security (in pursuance of the statute of Westm. 2), similar to the bond required by statute in Illinois and other states. The original writ of *replegiari facias* was thus dispensed with; and the proceeding upon a complaint made to the sheriff, under the statute, was called a proceeding by "plaint." The statute of Illinois provides that the proceedings in action of replevin shall be commenced by *plaint*, and the word has the same meaning that it had in regard to proceedings under the statute of Marlbridge. It signifies that there is to be a complaint made that the goods were wrongfully taken, or wrongfully detained.

The statute of Illinois requires the plaintiff, or some one in his behalf, to make oath or affirmation that he is the owner of the property about to be replevied, or that he is then lawfully entitled to the possession thereof, and that the same has not been taken for any tax, assessment or fine levied by virtue of any law of the state, nor seized under any execution or attachment against the goods and chattels of such plaintiff, liable to execution or attachment.¹ It has been usual to file an affidavit, and to allege therein that the goods and chattels were wrongfully taken, or wrongfully detained; and in that manner the plaint mentioned in the statute has been usually made.² The primary purpose of the action is to recover property *in specie*—not its value.³

Where the action lies, etc.—The action of replevin lies, for the recovery, *in specie*, of any personal chattel which has been taken and detained from the owner's possession, together with damages for the detention; unless the taking and detention can be justified or excused, or the right of action is suspended or discharged.⁴

It lies at common law, not only for goods distrained, but for goods taken and unjustly detained for any other cause whatever; except that, where goods are taken by process of law, the party against whom the process issued can not replevy them; but if the goods of a stranger are taken, he may replevy

¹ Rev. Stat. (1893), 1172; Rev. Stat. (1895), 1256; 2 Starr & Curtis 2012.

² *Anderson v. Hapler*, 34 Ill. 436.

³ *Herdie v. Young*, 55 Pa. St. 176.

⁴ 2 Greenl. Ev., Sec. 560; *Stanley v. Robinson*, 14 Ill. App. 480.

them from the sheriff.¹ By statute in most of the states of the Union, replevin may be brought whenever goods or chattels have been wrongfully distrained, or otherwise wrongfully taken, or are wrongfully detained. It lies by a bailee entitled to possession, against the owner of chattels.²

If a chattel is sold by a borrower of it, the owner may recover it in an action of replevin of whomsoever he may find in possession of it.³ Where a purchase of goods is effected by means of false and fraudulent representations on the part of the buyer, the seller may treat the sale, though on credit, as void, and maintain replevin⁴ without any previous demand.⁵

Where a person operating a ferry unlawfully seizes a boat belonging to a rival ferry, for an alleged encroachment upon his franchise, the person aggrieved may recover his boat by an action of replevin.⁶ Where a person had agreed to make three wagons for another, within a limited time, it was held that it was a general contract, and that no title passed on the completion of the wagons without a delivery, and therefore an action of replevin would not lie to recover them.⁷

If a person sells goods to another, and delivers them, although the purchaser is to give a note with security for the goods at a future day, a sale by the purchaser will be good, and the buyer from him in good faith will hold the goods against the first vendor.⁸ Warehousemen have a lien on property stored with them, for proper charges, and may retain possession of the property to secure payment of such charges.⁹

¹ *Simmons v. Jenkins*, 76 Ill. 479; *Samuel v. Agnew*, 80 Ill. 553; *Cavener v. Shinkle*, 89 Ill. 161; *Keller v. Robinson*, 153 Ill. 458; Gipp. on Rep. 141; *Clark v. Skinner*, 20 Johns. 470; 2 Greenl. Ev., Sec. 560.

² *Simpson v. Wrenn*, 50 Ill. 222.

³ *Roland v. Gundy*, 5 Ohio 202; *McNeill v. Arnold*, 17 Ark. 154; *Trudo v. Anderson*, 10 Mich. 357.

⁴ *Gray v. St. John*, 35 Ill. 222; *Sweitzer v. Tracy*, 76 Ill. 345; *Ex. Co. v. Willsie*, 79 Ill. 92; *R. R. Co. v. Phillips*, 60 Ill. 190; *Ames v. Moir*, 130 Ill. 592; *Farwell v. Han-*

chett, 120 Ill. 573; *Farwell v. Linn*, 59 Ill. App. 245.

⁵ *Hall v. Gilmore*, 40 Me. 578; *Hanchett v. Sorg*, 15 Ill. App. 493; *Doane v. Lockwood*, 115 Ill. 490; *Farwell v. Hanchett*, 120 Ill. 573.

⁶ *Gear v. Bullerick*, 34 Ill. 74.

⁷ *Updike v. Henry*, 14 Ill. 378; *Ledbetter v. Blessingame*, 31 Ala. 495; *Pettengill v. Merrill*, 47 Me. 109; *Haverstick v. Fergus*, 71 Ill. 105.

⁸ *Brundage v. Camp*, 21 Ill. 330.

⁹ *Low v. Martin*, 18 Ill. 286; see *Henry v. Eddy*, 34 Ill. 508.

It has been held in Indiana, that if the plaintiff in an action of replevin is nonsuited, he is not thereby barred from bringing another action, the statute of Westm. 2, c. 2, prohibiting a second replevin after a nonsuit, being local to England, and not in force in that state.¹ In Illinois the plaintiff may plead, to a suit brought upon the replevin bond, that the merits were not tried in the replevin suit.² Where one wrongfully sues out a writ of replevin, and dismisses the suit, he illegally takes and assumes ownership of the property; and in such a case the owner may maintain replevin for the property, and is not confined to the remedy on the bond. The first replevin suit does not change the ownership of the property.³

The general ownership of property is not necessarily involved or determined in replevin, but the right of possession is.⁴ Replevin lies for books of records,⁵ and to recover the books of a corporation which are wrongfully detained,⁶ or for private letters.⁷ It may be brought to recover possession of a deed which is withheld from a person in whom the title to the land thereby conveyed is vested.⁸

In general, it lies for any tortious or unlawful taking of the property of another, or whenever trespass *de bonis asportatis* can be sustained.⁹ Replevin lies for a swarm of bees;¹⁰ and for the increase of an animal, though the increase was after the taking.¹¹ It will not lie for animals *feræ naturæ*, and unreclaimed.¹² Money in a box, or leather made into shoes, if sufficiently identified, may no doubt be recovered in replevin. When property has undergone an alteration, a new right of action

¹ *Daggett v. Robins*, 2 Blackf. 415; see *Walbridge v. Shaw*, 7 Cush. 560.

² Rev. Stat. (1893), 1174; Rev. Stat. (1895), 1258; Starr & Curtis 2018.

³ *Bruner v. Dyball*, 42 Ill. 34.

⁴ *Warner v. Matthews*, 18 Ill. 83; *McCoy v. Cadle*, 4 Iowa 557; *Curd v. Wunder*, 5 Ohio 92; *Cleaves v. Herbert*, 61 Ill. 126; *R. R. Co. v. Shaw*, 46 Ill. App. 603.

⁵ *Sawyer v. Baldwin*, 11 Pick. 492; *Sudbury v. Stearns*, 21 Pick. 148.

⁶ *Road v. Hixon*, 5 Ind. 165.

⁷ *Eyer v. Higbee*, 35 Barb. 502.

⁸ *King v. Gilson*, 32 Ill. 348; see *Wilson v. Rybolt*, 17 Ind. 391; Ewell on Fixtures 417.

⁹ *Wheeler v. McFarland*, 10 Wend. 322; *Allen v. Crary*, 10 Wend. 349; *Rogers v. Arnold*, 12 Wend. 32; *Hopkins v. Hopkins*, 10 Johns. 369; *Buffington v. Gerrish*, 15 Mass. 156; *Stoughton v. Rappallo*, 3 S. & R. 562.

¹⁰ Morris on Replevin 54.

¹¹ Morris on Replevin.

¹² Morris on Replevin.

arises to reclaim it by replevin in that shape which it has assumed. And in such case it should be described in the writ as it existed at the time of the commencement of the suit.¹

A person may maintain replevin for boards made from trees wrongfully cut on his land and taken away. And it is a general principle that the owner of property wrongfully taken may pursue it so long as it can be identified, unless it is annexed to or made part of some other thing which is the principal—as lumber put into the house.²

If property or choses in action have been pledged to secure a debt, the owner must pay, or at least tender, the amount due, before he can claim the right to resume possession of the property, or bring replevin for its recovery.³ Where property is sold and delivered to the purchaser, a part of the price being paid and the residue to be paid in installments the vendor can not maintain replevin for such property, upon the refusal of the purchaser to make further payment—on the ground that the property is not such as he bargained for—without refunding the money already paid.⁴

The question of the validity of a tax can not be considered in an action of replevin.⁵ Replevin will not lie in a state court against a United States marshal who has seized goods under an execution from a United States court.⁶

Who may maintain the action.—It is not necessary, in order to maintain this action, that the plaintiff should be the owner of the property. He must, however, have either the general property in the goods taken or detained, or a special property therein.⁷ And it makes no difference whether the

¹ *Brown v. Sax*, 7 Cow. 95; *Betts v. Lee*, 5 Johns. 348; *Wingate v. Smith*, 20 Maine 287.

² *Davis v. Easley*, 13 Ill. 192; *Cromelian v. Brink*, 29 Penn. 552; *Warren v. Leland*, 2 Barb. 613; *Society v. Fleming*, 11 Iowa 533; *Anderson v. Hapler*, 34 Ill. 436.

³ *Henry v. Eddy*, 34 Ill. 508; 2 Greenl. Ev., Sec. 648; *Chickering v. Raymond*, 15 Ill. 362.

⁴ *Hamilton v. Mfg. Co.*, 54 Ill. 370.

⁵ *R. R. Co. v. Andrews*, 53 Ill. 177; *McClaghrey v. Cratzenberg*, 39 Ill. 117; *Bilbo v. Henderson*, 21 Iowa 56; Rev. Stat. (1893), 1172; Rev. Stat. (1895), 1256; 2 Starr & Curtis, 2012.

⁶ *Covell v. Heyman*, 111 U. S. 176; *Freeman v. Howe*, 24 How. 450.

⁷ *Boughton v. Bruce*, 20 Wend. 234; *Shearick v. Huber*, 6 Binn. 3;

claimant's property in the goods is absolute or qualified,¹ or whether he has ever had the possession or not,² if he has the right of possession. He must, however, have at least a special property in the goods claimed.³ Thus a mere custodian,⁴ or receiptor to an officer or any other bailee for safe keeping,⁵ or a mere servant, who has charge of goods as such only,⁶ can not maintain replevin.

The plaintiff must have had a right to the possession of the property at the time of the taking or detention.⁷ If he has not the immediate right of possession, the action can not be supported,⁸ but he must proceed by an action on the case.⁹ One joint owner of a chattel can not maintain replevin against the other.¹⁰ A father, as the natural guardian of his children, where they have no other guardian, may maintain the action for their property.¹¹

Where a minor makes an exchange of a horse belonging to his father, and the father apparently acquiesces in the bargain for a considerable time after it has been made, he can not recover the horse his son has exchanged in action of replevin.¹² If a person seeks to maintain an action of replevin for a steam

Young v. Kimball, 23 Penn. 193;
Broadwater v. Darin, 10 Mo. 277;
1 Chit. Pl. 163.

¹ *Collins v. Evans*, 15 Pick. 63;
Rogers v. Arnold, 12 Wend. 30;
Whitewell v. Wells, 24 Pick. 25;
Gillett v. Treganza, 6 Wis. 343; *Les-*
ter v. McDonald, 18 Penn. St. 91;
Gartside v. Nixon, 43 Mo. 138.

² *Whitewell v. Wells*, 24 Pick. 25;
Johnson v. Hunt, 11 Wend. 137;
Williams v. West, 2 Ohio 82; *Bos-*
tick v. Brittain, 25 Ark. 482.

³ 5 Dane's Dig. 515; *Pattison v.*
Adams, 7 Hill, 126; *Haller v. Cole-*
son, 23 Ill. App. 324.

⁴ *Harris v. Smith*, 3 S. & R. 20;
Perley v. Foster, 9 Mass. 109; *Harris*
v. McIntosh, 1 Johns. 380.

⁵ *Waterman v. Robinson*, 5 Mass.
303; *Simpson v. McFarland*, 18
Pick. 427.

⁶ *Harris v. Smith*, 3 S. & R. 20.

⁷ *Gates v. Gates*, 15 Mass. 310;
Collins v. Evans, 15 Pick. 63; *Wal-*
pole v. Smith, 4 Blackf. 304; *Pratt*
v. Parkman, 24 Pick. 42; 1 Chit. Pl.
163; *Broadwater v. Darine*, 10 Mo.
277; *Pilkington v. Trigg*, 28 Mo. 95;
School v. Lord, 44 Maine 374; *Ator*
v. Riv, 21 Ill. App. 309.

⁸ 1 Chit. Pl. 163, a; *Wheeler v.*
Train, 3 Pick. 255; *Collins v. Evans*,
15 Pick. 63; *Ingraham v. Martin*,
3 Shepley 373.

⁹ 1 Chit. Pl. 263, a.

¹⁰ *McElderry v. Flanagan*, 1 H.
& G. 308; *Prentice v. Ladd*, 12
Conn. 331; *Wills v. Noyes*, 12 Pick.
324; *Belcher v. Van Dusen*, 37 Ill.
281; *Gaar v. Hurd*, 92 Ill. 315; *Stan-*
ley v. Robinson, 14 Bradw. 480;

¹¹ *Smith v. Williamson*, 1 Har. &
J. 147.

¹² *Hall v. Harper*, 17 Ill. 82.

saw-mill building situated upon the land of another,¹ with all the machinery, etc., belonging to the same, he should at least aver in his plaint and declaration that the property in question is personal estate. Replevin does not lie for house permanently attached to land.²

The owner of land may bring replevin for chattels severed from it where there was no adverse possession, but not if the land is held adversely. He can not assert his title to the land in that manner.³ Consistently with this rule, a landlord may bring replevin for chattels wrongfully severed from the freehold by a tenant, as the title to the land is not thereby drawn in question.⁴

Replevin can only be supported for taking personal chattels, and not for taking things attached to the freehold, and which are in law considered fixtures, and can not be delivered to the plaintiff or to the defendant upon a writ of *retorno habendo*.⁵ Hence it does not lie for trees growing; but if they are cut down by a stranger, who converts them into posts and rails, the action may be maintained.⁶

Where the property is left with a person who has advanced money upon it, and is to keep it until he shall be reimbursed, he may replevy it from one who attaches it as a creditor of the pledgor;⁷ and unless it is made to appear that the attaching party was really a creditor he can not complain that it was a design to protect the property of the debtor. The writ of attachment does not of itself show that the party in it was debtor of the plaintiff. It only shows that the officer who made the attachment acted in behalf of an assumed creditor.⁸

¹ *Chatterton v. Saul*, 16 Ill. 149; see *Ogden v. Stock*, 34 Ill. 522; *Dorr v. Dudderar*, 88 Ill. 107.

² *Salter v. Sample*, 71 Ill. 430.

³ *Anderson v. Hapler*, 34 Ill. 436; *Davis v. Easley*, 13 Ill. 192; 1 Smith's Lead. Cas. 485.

⁴ *Langdon v. Paul*, 22 Vt. 205; *Sands v. Pfeiffer*, 10 Cal. 258; *Sanders v. Reed*, 12 N. H. 558; *Anderson v. Hapler*, 34 Ill. 436; *Ogden v. Stock*, 34 Ill. 522.

⁵ *De Mott v. Hagerman*, 8 Cowen 220; *Cresson v. Stout*, 17 Johns. 116; see *Anderson v. Hapler*, 34 Ill. 436.

⁶ *Johnson v. Hunt*, 11 Wend. 137; 1 Chit. Pl. 146; *Anderson v. Hapler*, 34 Ill. 436; *Davis v. Easley*, 13 Ill. 192; *Robertson v. Jones*, 71 Ill. 405.

⁷ *Currier v. Ford*, 26 Ill. 488.

⁸ *Currier v. Ford*, 26 Ill. 488; *Bassett v. Armstrong*, 6 Mich. 397.

A person who consents that grain left in a warehouse may be put in bulk with other grain, with the understanding that a like quantity and quality shall be delivered to him on request, can not maintain replevin for the grain. If the intermixture of grain was without the consent of the bailor, or was the wrongful act of the warehouseman, it might be otherwise.¹

If there is confusion of goods by reason of intermixture (by consent of the owners), so that each owner can not distinguish his property, each will have a proportionate interest in the whole. Replevin lies for specific property, capable of identification and an actual return, not for an undivided interest or share.²

If it was understood and intended that the title to the property should pass without any further action of the parties purchasing and selling, then the purchaser may maintain replevin, whether the goods had been delivered to him or not.³ But where a contract was made to sell so many bushels of corn, more or less, to be delivered within a specified time, and a small sum was paid to bind the bargain, it was held that the buyer had no right to replevy corn in the possession of the seller, on the failure of the latter to perform the contract. The only remedy of the buyer was an action on the contract.⁴

A mortgagee, or assignee of a chattel mortgage,⁵ upon condition broken, may maintain replevin. But if it is agreed that the mortgagor shall retain possession for a stipulated time, the mortgagee can not maintain the action until such time has expired.⁶ One who has bought and receipted for goods, at a sheriff's sale, is the owner of such goods, and may replevin them.⁷

An officer may maintain replevin against a custodian who refuses to deliver goods entrusted to him by the officer, and the

¹ *Low v. Martin*, 18 Ill. 286; see *Warner v. Cushman*, 31 Ill. 283.

² *Low v. Martin*, 18 Ill. 286; *Hart v. Fitzgerald*, 2 Mass. 511; *Stanley v. Robinson*, 14 Ill. App. 480.

³ *Rhea v. Riner*, 21 Ill. 526.

⁴ *Low v. Freeman*, 12 Ill. 467; see *Udike v. Henry*, 14 Ill. 378; *Led-*

beter v. Blessingame, 31 Ala. 495; *Bradley v. Michael*, 1 Ind. 551;

Winslow v. Leonard, 24 Penn. 14.

⁵ *Barbour v. White*, 37 Ill. 164.

⁶ *Ingraham v. Martin*, 3 Shepley 373.

⁷ *Freeman v. Morse*, 20 Ill. 429; *Hazzard v. Burton*, 4 Harr. 63.

custodian can not set up title in himself.¹ In Illinois, and some other states, a married woman may sue alone, in replevin, to recover her separate property,² even against her husband.³

Who may be made defendant.—In general, any one in possession of goods may be made defendant. If goods are taken by one person at the request of another, the action may be maintained against either or both.⁴ Where goods levied on under execution are replevied the officer is the proper person to be made defendant; the plaintiffs in execution are not necessary or proper parties to the suit.⁵

Demand—When necessary.—If the possession of the property claimed has been obtained by delivery, or otherwise lawfully, a demand and refusal are necessary before bringing suit.⁶ To maintain an action of replevin by the mortgagee, for the return of property taken from the mortgagor on execution, there must be proof of demand and refusal to return the property, unless there is a waiver of the demand, or proof that it would have been unavailing.⁷ The demand may be made by one who stands *in loco parentis* to the claimant.⁸

Where the possession of goods has been wrongfully obtained, no demand is necessary.⁹

COMMENCEMENT OF THE ACTION.

Venue.—Section 3 of the statute provides that “the action may be brought in any county in which the goods and chat-

¹ *Farwell v. Hanchett*, 120 Ill. 573; *Oswald v. Hutchinson*, 26 Ill. App. 273.

² *Dean v. Bailey*, 50 Ill. 481; *Chapman v. Allen*, 15 Texas 278.

³ *Emerson v. Clayton*, 32 Ill. 493; *Dean v. Bailey*, 50 Ill. 481; see *Cole v. Riper*, 44 Ill. 58; *Wortman v. Price*, 47 Ill. 22; *Dyer v. Keefer*, 51 Ill. 525; *Pike v. Baker*, 53 Ill. 163.

⁴ *Hall v. White*, 106 Mass. 600; *Richardson v. Reed*, 4 Gray 441; *Gilb. Rep.* 162; *Britt v. Aylett*, 6 Eng. (Ark.) 475; see *Dobbins v. Hanchett*, 20 Bradw. 396.

⁵ *Blatchford v. Boyden*, 122 Ill. 657.

⁶ *Ingalls v. Buckley*, 13 Ill. 315; *Hudson v. Maze*, 3 Scam. 579; *Clark v. Lewis*, 35 Ill. 417; *Hamilton v. Mfg. Co.*, 54 Ill. 370; *Broughton v. Bruce*, 20 Wend. 234; see *Ingalls v. Buckley*, 15 Ill. 224; *R. R. Co. v. Noe*, 77 Ill. 513; *Holliday v. Barth*, 11 Bradw. 206.

⁷ *Keller v. Robinson*, 153 Ill. 458.

⁸ *Newman v. Bennett*, 23 Ill. 427.

⁹ *Woodward v. Woodward*, 14 Ill. 466; *Follett v. Edwards*, 30 Ill. App. 386; *Clarke v. Lewis*, 35 Ill. 417; *Butters v. Haughwout*, 42 Ill. 18;

tels or any part of them are, or in which the defendant, or, if several defendants, either of them resides or may be found.”¹

Section 4 of the statute provides that “the person bringing such action shall, before the writ issues, file with the clerk of the court in which the action is brought, an affidavit showing that the plaintiff in such action is the owner of the property described in the writ, and about to be replevied, or that he is then lawfully entitled to the possession thereof, and that the property is wrongfully detained by the defendant; and that the same has not been taken for any tax, assessment or fine levied by virtue of any law of the state, nor seized under any execution or attachment against the goods and chattels of such plaintiff, liable to execution or attachment, nor held by virtue of any writ of replevin, against such plaintiff.”²

It is usual to file an affidavit in writing. The affidavit may be in the following form :

No. 161a. Affidavit in replevin.

STATE OF ILLINOIS, }
County of —, } ss. A. B., of, etc., on oath states, that he is the owner of (or lawfully entitled to the possession of) the following described goods and chattels, to wit: (*Here describe the property*), of the value of — dollars; and that the said property is wrongfully detained by one C. D. of, etc.; and that the same has not been taken for any tax, assessment or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of him, the said A. B., liable to execution or attachment, nor held by virtue of any writ of replevin against him, the said A. B.

A. B.

Subscribed and sworn to, etc.

There is no necessity of any other averments in the affidavit than those prescribed by the statute.³

But such as are prescribed must be made in full and positive

Tuttle v. Robinson, 78 Ill. 332; *Yates v. Smith*, 11 Bradw. 459; *Dobbins v. Hanchett*, 20 Bradw. 396; *Cummins v. Holmes*, 109 Ill. 15; *Goldschmidt v. Berry*, 18 Ill. App. 276.

¹ 2 Starr & Curtis, An. Stat. 2011; Rev. Stat. (1893), 1772; Rev. Stat. (1895), 1256; see *Whisler v. Roberts*, 19 Ill. 274.

² 2 Starr & Curtis, 2012; Rev. Stat.

(1893), 1172; Rev. Stat. (1895), 1256; see *Anderson v. Hapler*, 34 Ill. 436; *Whisler v. Roberts*, 19 Ill. 274; *Van Namee v. Bradley*, 69 Ill. 299; *Seabury v. Ross*, 69 Ill. 533; *Simmons v. Jenkins*, 76 Ill. 479; *Burton v. Curgea*, 40 Ill. 320.

³ *Whisler v. Roberts*, 19 Ill. 274; *People v. Core*, 85 Ill. 248.

terms, when made by the plaintiff.¹ "When the affidavit is made by any person on behalf of the plaintiff, the same may be made upon the information and belief of the affiant."² The statute does not require the plaintiff in replevin to state the value of the property to be replevied. The sheriff must ascertain and fix the value.³

The plaintiff is estopped to deny the value fixed by him in his affidavit, though the defendant is not bound thereby.⁴ An affidavit in replevin may be amended;⁵ but application to amend should be made in apt time. A motion to dismiss for want of sufficient affidavit comes too late after a party has appeared and pleaded.⁶ Such application to amend an affidavit is addressed to the discretion of the court.⁷

Bond.—Section 10 of the statute provides that "before the execution of any writ of replevin, the plaintiff or some one else on his behalf shall give to the sheriff, constable or other officer, bond with sufficient security in double the value of the property about to be replevied, conditioned that he will prosecute such suit to effect and without delay, and make return of the property, if return thereof shall be awarded, and save and keep harmless such sheriff, constable or other officer (as the case may be) in replevying such property."⁸

The bond should run to the officer serving the writ,⁹ and a bond which fails to show the name of the defendant is a nullity.¹⁰ A replevin bond, not under seal, is valid as a contract of indemnity.¹¹

¹ *Campbell v. Head*, 13 Ill. 122; *Wilbur v. Flood*, 16 Mich. 40; *Frink v. Flanagan*, 1 Gilm. 35; *McClaghry v. Cratzenberg*, 39 Ill. 117.

² 2 Starr & Curtis 2012; Rev. Stat. (1893) 1173; Rev. Stat. (1895) 1257; *Colborn v. Barton*, 14 Bradw. 449.

³ *People v. Core*, 85 Ill. 248.

⁴ Wells on Rep., Secs. 569, 660; *Ice Co. v. Webster*, 125 U. S. 426; *O'Donnell v. Colby*, 55 Ill. App. 112.

⁵ *Campbell v. Head*, 13 Ill. 122; *Frink v. Flanagan*, 1 Gilm. 35; *Cutler v. Rathbone*, 1 Hill 204; *Hawley v. Bates*, 19 Wend. 632; *Whaling v.*

Shales, 20 Wend. 673; *Bates v. Williams*, 43 Ill. 494; *Troutman v. Hill*, 5 Bradw. 396.

⁶ *Frink v. Flanagan*, 1 Gilm. 35; *Fryatt v. Sullivan*, 5 Hill 119.

⁷ 2 Starr & Curtis, 2016; Rev. Stat. (1893) 1174; Rev. Stat. (1895) 1258; *McClaghry v. Cratzenberg*, 39 Ill. 117; *Yott v. People*, 91 Ill. 11.

⁸ *Wolfe v. McClure*, 79 Ill. 564; *Fahnstock v. Gilham*, 77 Ill. 637.

⁹ *Speer v. Skinner*, 35 Ill. 282.

¹⁰ *Arter v. People*, 54 Ill. 228; *Mathews v. Storms*, 72 Ill. 316.

¹¹ *Edwin v. Cox*, 61 Ill. App. 567.

No. 162. *Declaration in replevin.*

In the ——— Court.

——— Term, 18—.

STATE OF ILLINOIS, }

County of —, } sct. A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea wherefore he took the goods and chattels of the plaintiff, and unjustly detained the same, until, etc.: For that the defendant, on the — day of —, in the year 18—, in the county aforesaid, took the goods and chattels, to wit, (*here describe the property*) of the plaintiff, of the value of — dollars, and unjustly detained the same, until, etc.

(*Second count, for detaining, etc.*) And also wherefore the defendant unjustly detained the goods and chattels of the plaintiff, until, etc.: For that the defendant, on the — day of —, in the year 18—, in the county aforesaid, other the goods and chattels of the plaintiff, to wit, (*here describe the property*) of the value of — dollars, unjustly detained, until, etc.

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of — dollars, and therefore he brings his suit, etc.

In Illinois, if the goods described in the writ of replevin can not be found by the officer, the plaintiff may declare in trover, and if there is personal service, recover the value of the goods, with damages for the wrongful taking or detention, and costs.¹ If a part only is found, a count in trover may be joined for the residue,² which count may be as follows:

No. 163. *Count in trover, to be inserted when part of goods could not be replevied.*

And also for that whereas the plaintiff, on the day last aforesaid, in the county aforesaid, was lawfully possessed, as of his own property, of certain other goods and chattels, to wit, (*here describe the property*), of the value of — dollars; and being so possessed thereof, the plaintiff, afterwards, to wit, on the same day, there casually lost the last mentioned goods and chattels out of his possession, and the same afterwards, to wit, on the same day, there came to the possession of the defendant by finding: Yet the defendant, well knowing the last-mentioned goods and chattels to be the property of the plaintiff has not as yet delivered the same, or any or either of them, or any part thereof, to the plaintiff, though often thereto requested, but has hitherto refused so to do, and afterwards, to wit, on the same day, there converted and disposed of the last-mentioned goods and chattels to his own use.

Care should be taken to describe the property correctly, lest

¹ 2 Starr & Curtis, 2015; Rev. Stat. (1893), 1174; Rev. Stat. (1895), 1258.

² *Yott v. People*, 91 Ill. 11; *McGavack v. Chamberlain*, 20 Ill. 219.

there should be a variance between the proof and the declaration.¹

DEFENSES TO THE ACTION.

For pleas in abatement, etc., see the precedents in Defenses to an Action, chapter III.

Pleas in bar.—Properly speaking, there is no general issue in the action of replevin;² because there is no plea which alone puts in issue the whole of the declaration.

No. 164. Plea of NON CEPIT.

In the ——— Court.

—— Term, 18—

C. D. }
ats. } Replevin.
A. B. } And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff has above thereof complained against him; And of this the defendant puts himself upon the country, etc.

The plea of *non cepit*, at common law, where the gist of the action consists in the tortious taking of the plaintiff's goods by the defendant, is said to be the general issue in replevin.³ It merely puts in issue the taking of the goods, and admits the property to be in the plaintiff; and if the defendant succeeds thereon, he will not be entitled to a return of the goods.⁴ A finding for him, on that issue, merely protects him from damages.

To entitle the defendant to a return of the goods replevied he must contest the plaintiff's right to the property; and this he may do by pleading specially property in himself, or in a

¹ *Taylor v. Riddle*, 35 Ill. 567.

² *Dole v. Kennedy*, 38 Ill. 282;
Anderson v. Talcott, 1 Gilm. 365;
Amos v. Stinnott, 4 Scam. 440.

³ 2 Greenl. Ev., Sec. 562; *Amos v. Sinnott*, 4 Scam. 440.

⁴ *Simpson v. McFarland*, 18 Pick. 427; *People v. Niagara*, 4 Wend. 217; *Sawyer v. Huff*, 25 Me. 464; *Carroll v. Harris*, 19 Ark. 237; 2

Greenl. Ev. 562; *Galusha v. Butterfield*, 2 Scam. 227; *Anderson v. Talcott*, 1 Gilm. 365; *Vose v. Hart*, 12 Ill. 378; *Bourke v. Riggs*, 38 Ill. 320; *Hanford v. Obrecht*, 38 Ill. 493; *Underwood v. White*, 45 Ill. 437; see *Hanford v. Obrecht*, 49 Ill. 146; *Matson v. Hanisch*, 5 Bradw. 102; *Simmons v. Jenkins*, 76 Ill. 479; *Hackett v. Jones*, 34 Ill. App. 562.

stranger, or in the plaintiff and himself, as bailor and bailee, or that he took the cattle *damage feasant*, or the goods for tolls, customs, or services, as well as for many other causes; and he may have a return until his demands are satisfied.¹ To a declaration or count charging only a wrongful *detention* of the goods of the plaintiff, the plea of *non cepit* is inapplicable, and would be declared bad on a demurrer, or might be stricken out or disregarded, at the plaintiff's election, as presenting an immaterial issue.²

If therefore there are several counts in the declaration, and a *taking* is not charged in all of them, the plea is to be limited accordingly, in this manner:

And the defendant, etc., comes, etc., and, as to the *first* count of the said declaration, says that he did not take the goods and chattels in the said *first* count mentioned, or any, etc., in manner and form as the plaintiff has above in that count complained against him: And of this, etc.

No. 165. Plea of NON DETINUIT.

(*This plea is the same in form as non cepit, only substituting the words wrongfully detain for the word take. When pleaded to one of several counts, and after non cepit, or other plea, to another count, this plea may be as follows:*) And as to the *second* count of the said declaration, the defendant says that he did not wrongfully detain the goods and chattels in the said *second* count mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff has above in that count complained against him: And of this the defendant puts himself upon the country, etc.

The declaration in replevin charges that the defendant detained the goods "until, etc.," that is, until replevied. The plea should therefore be that he *did* not detain the goods (*non detinuit*, etc.), and not that he *does* not detain them (*non detinet*, etc.). The action of replevin in the *detinet*—now obsolete—was to recover the value of the goods, and damages where the goods were still detained by the defendant.³

In the present action in the *detinuit*, the plaintiff can only

¹ *Amos v. Sinnott*, 4 Scam. 440; *Baker v. Fales*, 16 Mass. 155; *Anderson v. Talcott*, 1 Gilm. 365; *Vose v. Hart*, 12 Ill. 378; *Gerber v. Monie*, 56 Barb. 652; 1 Chit. Pl. 499; *Bemus v. Beekman*, 3 Wend. 667.

² *Amos v. Sinnott*, 4 Scam. 440; *Walpole v. Smith*, 4 Blackf. 304; *Davis v. Calvert*, 17 Ark. 85.

³ 1 Chit. Pl. 145; see 2 Bouv. L. Dict. 417; *Pierce v. Van Dyke*, 6 Hill. 613.

recover damages for the taking of the goods, and for the detention till the time of the replevy, and not the value of the goods themselves.¹

Where the declaration is for the wrongful detention of the goods of the plaintiff, the plea of *non detinuit* is said to be the general issue;² and under it the plaintiff must prove, not only the wrongful detention, but also his right to the immediate possession.³ And under such plea he must prove a demand and refusal, or what would amount to a conversion, in order to establish an unlawful detention by the defendant.⁴

This plea admits the right of property to be in the plaintiff, and only puts in issue the detention by the defendant;⁵ and if the issues are found for the defendant, he is merely protected from damages and costs, and he will not be entitled to a return of the property.⁶ Where the action is against two defendants, each may interpose the plea of *non detinuit* separately.⁷ When trover is joined with replevin (as permitted by statute in Illinois), the plea of "not guilty" to the count in trover may be as follows:

No. 166. Plea of "not guilty," to count in trover, when joined with replevin.

And as to the *third* count of the said declaration, the defendant says that he is not guilty of the supposed grievances above in the said *third* count laid to his charge, or any or either of them, in manner and form as the plaintiff has above in that count complained against him: And of this the defendant puts himself upon the country, etc.

¹ 1 Chit. Pl. 146; *Potter v. North*, 1 Saund. 347.

² *Amos v. Sinnott*, 4 Scam. 440; *Walpole v. Smith*, 4 Blackf. 304; *Snook v. Davis*, 6 Mich. 166.

³ *Rogers v. Arnold*, 12 Wend. 30; *Amos v. Sinnott*, 4 Scam. 440; see *Ingalls v. Bulkley*, 15 Ill. 224; *Johnson v. Howe*, 2 Gilm. 342.

⁴ *Ingalls v. Bulkley*, 15 Ill. 224; *Johnson v. Howe*, 2 Gilm. 342; *Seaver v. Dingley*, 4 Greenl. 306; *Beebe v. DeBaun*, 3 Eng. (Ark.) 510.

⁵ *Ingalls v. Bulkley*, 15 Ill. 224; *Wells v. McClenning*, 23 Ill. 409; see *Anderson v. Talcott*, 1 Gilm. 365; *Johnson v. Howe*, 2 Gilm. 342; *Vose v. Hart*, 12 Ill. 378; *Matson v. Hansisch*, 5 Bradw. 102; *Miller v. Gable*, 30 Ill. App. 578.

⁶ *Vose v. Hart*, 12 Ill. 378; *Bourk v. Riggs*, 38 Ill. 320; see *Boyd v. McAdams*, 16 Ill. 146; *Ator v. Rix*, 21 Ill. App. 309.

⁷ *Boyd v. McAdams*, 16 Ill. 146.

No. 167. Plea of property in the defendant.

(*First plea non cepit or non detinuit, as ante, No. 164 or No. 165.*) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, (*) that the said goods and chattels in the said declaration mentioned, at the said time when, etc., were the property of him, the defendant, and not of the plaintiff, as by the said declaration is above supposed: And this the defendant is ready to verify; wherefore he prays judgment, etc.

The conclusion of the plea, in full, is: "And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, the defendant; and he also prays a return of the said goods and chattels, together with his damages and costs in this behalf, according to the form of the statute¹ in such case made and provided, to be adjudged to him," etc. If the plea is not to the whole declaration, it is of course to be limited accordingly. See the remarks, *ante*, page 57.

No. 168. Replication to the plea of property in the defendant.

In the ——— Court.

—— Term, 18—.

A. B. }
vs. } Replevin.
C. D. }

And the plaintiff, as to the plea of the defendant by him *secondly* above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says, that the said goods and chattels in the said declaration mentioned at the said time when, etc., (*) were the property of him, the plaintiff, and not of the defendant, as he has above in that plea alleged: And this the plaintiff prays may be inquired of by the country, etc.

It is held that under the plea of property in the defendant, or in a stranger, in an action of replevin, the material inquiry will be as to the property of the plaintiff in the goods, which he must be prepared to prove, the *onus probandi* of this issue being on him.² And under such plea the defendant may show any legal title to the property, no matter how derived.³

¹ Rev. Stat. (1893), 1174; Rev. Stat. (1895), 1258; 2 Starr & Curtis 2016.

² *McIlvaine v. Holland*, 5 Harr. 10; *Sprague v. Kneeland*, 12 Wend. 161; *Rogers v. Arnold*, 12 Wend. 30; *Boynton v. Page*, 13 Wend. 425; 2 Greenl. Ev., Sec. 563. But see *Amos*

v. Sinnott, 4 Scam. 440; *Van Namee v. Bradley*, 69 Ill. 299; *Reynolds v. McCormick*, 62 Ill. 412; *Constantine v. Foster*, 57 Ill. 36; *Ballou v. Hushing*, 46 Ill. App. 174.

³ *O'Connor v. Trans. Co.*, 31 Ill. 230; *Belcher v. Van Duzen*, 37 Ill.

If the issue on such plea is found for the defendant, he will be entitled to a return of the property, and to damages.¹

No. 169. Plea of property in a stranger.

(As in No. 167, ante, to the asterisk, and then proceed:) that the said goods and chattels in the said declaration mentioned, at the said time when, etc., were the property of one E. F., and not of the plaintiff, as by the said declaration is above supposed; And this the defendant is ready to verify; wherefore he prays judgment, etc.

No. 170. Replication to plea of property in a stranger.

(As in No. 168, ante, to the asterisk, and then proceed:) were the property of the plaintiff, and not of the said E. F., as the defendant has above in that plea alleged; And this the plaintiff prays may be inquired of by the country, etc.

If the defendant succeeds on the plea of property in a stranger on the trial, he is entitled to a return of the property, and to damages for the detention. It is not necessary that he should, by proof, connect himself with the title of the stranger. It is sufficient that the right of property is not in the plaintiff.² In New York it was, however, held that the defendant must connect himself with the title of the stranger, and thus establish a right paramount to that of the plaintiff.³

Where the defendant pleads property in himself, or a third person, he must in the same plea traverse the plaintiff's allegation of right. It is held that in such case the allegation of property in the defendant, or a third person, is only to be considered as inducement to the traverse of the plaintiff's right, and the plaintiff must take issue on the traverse, and not on the inducement; and on such issue the substantial matter in dispute is the right of the plaintiff to the property. The plaintiff, it is held, has the affirmative of the issue, and must

281; see *Cleaves v. Herbert*, 61 Ill. 126.

¹ *Underwood v. White*, 45 Ill. 437; *Bourk v. Riggs*, 38 Ill. 320; *Anderson v. Talcott*, 1 Gilm. 365; see *Belcher v. Van Duzen*, 37 Ill. 281; *Edwards v. McCurdy*, 13 Ill. 496; *Hanford v. Obrecht*, 49 Ill. 146; *McArthur v. Howett*, 72 Ill. 358; *Lill*

v. Stockey, 72 Ill. 495; *Seabury v. Ross*, 69 Ill. 533.

² *Anderson v. Talcott*, 1 Gilm. 365; *Van Namee v. Bradley*, 69 Ill. 299; *Kerns v. Potter*, 71 Ill. 19; *Troutman v. Hills*, 5 Bradw. 396; *McFurlan v. McClellan*, 3 Bradw. 295; *Ator v. Rix*, 21 Ill. App. 309.

³ *Gerber v. Monie*, 56 Barb. 652.

sustain his right or fail in the action; and what the plaintiff must prove, the defendant is at liberty to disprove. This he may do by showing a state of facts inconsistent with the plaintiff's claim of right.¹

When a defendant pleads property in a stranger, and the issue on the plea is found for him, such finding is conclusive between the plaintiff and the defendant in another suit for the same property; but such stranger is not bound by the verdict in such case, unless he is in some way directly connected in interest with the party pleading the plea.²

No. 171. Plea of justification, by a sheriff, under a fi. fa. against a third person.

(First plea, non cepit, No. 164, or non detinuit, No. 165, or both, may be pleaded, if necessary; next, property in defendant, No. 167; next, property in a stranger, No. 169.) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, (*) that one J. K., before the said time when, etc., to wit, on, etc., sued out of the — court of the county aforesaid, a certain writ of *fieri facias*, of that date, against one L. M., directed to the sheriff of the county aforesaid, by which said writ the People of the said State of Illinois commanded such sheriff that of the goods and chattels, lands and tenements, in his county, of the said L. M., he should cause to be made the sum of — dollars, damages, and the sum of — dollars, costs of suit, which by the consideration of the said court, on, etc., the said J. K. recovered against the said L. M., together with interest thereon at the rate of six per centum per annum from the time of recovering the same as aforesaid, and also the further sum of —, accruing costs on the said judgment, and that such sheriff should have the said moneys ready to render to the said J. K. according to law, and should make return of the said writ in ninety days after the said date thereof, which said writ was thereupon on the said day of the date thereof, there delivered to the defendant, who then and from thenceforth, until and at and after the said time when, etc., was sheriff of the county aforesaid, to be executed in due form of law; by virtue of which said writ the defendant, as such sheriff as aforesaid, afterwards, and before the return day of the said writ, to wit, on the same day in the said declaration mentioned, being the said time when, etc. (and the said writ being then in full force and unsatisfied), there took the said goods and chattels in the said declaration mentioned, and detained the same, in execution of the said writ; which are the same taking

¹ *Anderson v. Talcott*, 1 Gilm. 365; *Atkins v. Byrnes*, 71 Ill. 326; *Lamping v. Payne*, 83 Ill. 463; *Reynolds v. McCormick*, 62 Ill. 412; *Prosser v. Woodward*, 21 Wend. 205, and cases

there cited. ² *Greenl. Ev.*, Sec. 563. But see *Amos v. Sinnott*, 4 Scam. 440; *Whitesides v. Collier*, 7 Dana 285.

³ *Edwards v. McCurdy*, 13 Ill. 496.

and detention in the said declaration above supposed, etc.: And the defendant further says, that the said goods and chattels in the said declaration mentioned, at the said time when, etc., were the property of the said L. M., and not of the plaintiff, as by the said declaration is above supposed, and were subject to execution, to wit, in the county aforesaid. And this the defendant is ready to verify; wherefore he prays judgment, etc.

The plaintiff may reply as in No. 170, *ante*, re-asserting his own right, and denying that of the defendant. See the remarks under the two forms of pleas next preceding the last. The above form may be readily adapted to a justification under a writ of attachment, by setting out such writ instead of the execution; and it may also be varied to suit a justification by a constable, or other officer. See pleas of justification, etc., in trespass, *post*.

The plea must aver the property to be in the defendant in the execution;¹ and traverse the plaintiff's right;² and allege that the defendant took the property by virtue of the execution, and that it was subject thereto.³ And the general rule is, that where an officer himself attempts to justify his acts done by virtue of his office, he must allege and prove himself an officer *de jure*.⁴

An officer, when sued in trespass or replevin for taking property on execution, can justify under the writ, without setting out the judgment upon which such writ is based; but if sued by a stranger, who claims the property by virtue of a sale anterior to the levy, it seems that it would be necessary to produce the judgment in evidence, in order to defeat the sale for fraud; but it would not be necessary to plead it.⁵ The production of the writ under which the officer acts is for him a sufficient justification. The rule is that a mere ministerial

¹ *Gentry v. Bargis*, 6 Blackf. 261; see *Simmons v. Jenkins*, 76 Ill. 479; *Lamping v. Payne*, 83 Ill. 463.

² *Bemus v. Beekman*, 3 Wend. 667; *Rogers v. Arnold*, 12 Wend. 30; *Prosser v. Woodward*, 21 Wend. 205; see 2 Greenl. Ev., Sec. 563; *Anderson v. Talcott*, 1 Gilm. 365.

³ *Dillion v. Wright*, 4 J. J. Marsh. 254; *Edey v. Fath*, 4 Bradw. 275; *Johnson v. Prussing*, 4 Bradw.

575; *Peck v. Hubbard*, 4 Bradw. 566; *Bliss v. Geer*, 7 Bradw. 612; *Wheeler v. McCorrister*, 24 Ill. 40; *Dayton v. Frye*, 29 Ill. 525.

⁴ *Case v. Hall*, 21 Ill. 632; *Schlenker v. Risley*, 3 Scam. 483.

⁵ *Jackson v. Hobson*, 4 Scam. 411; *Holmes v. Huncastor*, 12 Johns. 395; *Stephens v. Frazier*, 2 B. Mon. (Ky.) 250; see *Damon v. Bryant*, 2 Pick. 413.

officer, who executes the process of a court having jurisdiction of the subject-matter, and having also jurisdiction to issue such process, in general, or in certain specified cases, is protected in the execution of such process, if it is regular on its face, and apparently within the jurisdiction of the court issuing the same.¹

No. 172. Plea of lien on property, etc.

(*As in the last precedent, to the asterisk, and then proceed:*) that before the said time, when, etc., to wit, on, etc., in, etc., the plaintiff, being possessed of the said *carriage* in the said declaration mentioned, as of his own property, delivered the same to the defendant, he then and still being a *carriage-maker*, for the purpose of having the defendant put the said *carriage* in good order and repair for the plaintiff, for reward; and thereupon the defendant, at the request of the plaintiff, before the said time when, etc., to wit, on, etc., did there put the said *carriage* in good order and repair for the plaintiff; and thereby the plaintiff then and there became and was indebted to the defendant in the sum of — dollars, for the work by the defendant done, and materials by him furnished, in and about the putting of the said *carriage* in good order and repair for the plaintiff as aforesaid: And the said sum of money remaining unpaid, the defendant, at the said time when, etc., was entitled to detain the said *carriage* as and for a security for the payment of the said sum of money so due from the plaintiff to the defendant as aforesaid; wherefore the defendant did then and there detain the said *carriage*, as he lawfully might for the cause aforesaid; which is the same detention in the said declaration above supposed. And this the defendant is ready to verify; whereupon he prays judgment, etc.

By a little alteration, the above form may be adapted to other cases of lien, as those of warehousemen, innkeepers, attorneys, etc.

No. 173. Plea that the property was held by defendant as a pledge.²

(*As in No. 171, ante, to the asterisk and then proceed:*) that the plaintiff, before the said time when, etc., to wit, on, etc., in etc., delivered to the defendant the said goods and chattels in the said declaration mentioned, as a pledge, to be by him kept until the plaintiff should pay to the defendant the sum of — dollars, which the plaintiff then owed to him, the defendant: And the said sum of money remaining unpaid, the defendant, at the said time when, etc., there detained the said goods and chattels, as such pledge as

¹ *Jackson v. Hobson*, 4 Scam. 411; ² *Amos v. Sinnott*, 4 Scam. 440; *Parker v. Walrod*, 16 Wend. 517; *Baker v. Fales*, 16 Mass. 155; Com. *Stephens v. Frazier*, 2 B. Mon. (Ky.) Dig., Replevin, A.
250:

aforesaid, as he lawfully might do, for the cause aforesaid; which is the same detention in the said declaration above supposed. And this the defendant is ready to verify; wherefore he prays judgment, etc.

Where goods or choses in action have been pledged to secure the payment of a debt, the owner, before he can have the right to resume possession thereof, must pay the debt, or at least make a sufficient tender.¹

No. 174. Avowry or cognizance for rent.

(*First plea, non cepit, No. 164, ante; second plea, property in the defendant, No. 167, ante, etc.*) And the defendant well avows (*or, in a cognizance, "as bailiff of E. F. well acknowledges"*) the taking of said goods and chattels in the said declaration mentioned, in the said dwelling house in which, etc., and justly, etc., because he says, that the plaintiff (*or one "G. H."*) for a long time, to wit, for the space of —, next before and ending on, etc., and from thence until and at the said time when, etc., held and enjoyed the said dwelling house in which, etc., with the appurtenances, as tenant thereof to the defendant (*or "the said E. F."*), by virtue of a certain demise thereof to him, the plaintiff (*or "the said G. H."*), therefor made, at and under a certain yearly rent of — dollars, payable, etc., in every year, by even and equal portions; and because the sum of — dollars of the rent aforesaid, for the space of —, ending as aforesaid, on, etc., and from thence until and at the said time when, etc., was due and in arrear from the plaintiff to the defendant (*or "the said E. F.," in a cognizance*), he, the defendant, well avows (*or, in a cognizance, "as bailiff of the said E. F. acknowledges"*) the taking of the said goods and chattels, in the said dwelling house in which, etc., and justly, etc., as for and in the name of a distress for the said rent so due and in arrear to the defendant (*or "the said E. F."*) as aforesaid, and which still remains in arrear and unpaid. And this the defendant is ready to verify; wherefore he prays judgment, etc.²

No. 175. Plea in bar to an avowry or cognizance for rent—Traverse of the demise.

(*Similiter to non cepit, as ante, No. 10.*) And the plaintiff, as to the said avowry (*or "cognizance"*) of the defendant, says that the defendant, by reason of anything by him in his said avowry (*or "cognizance"*) alleged, ought not to avow (*or "as bailiff to the said E. F. to acknowledge"*) the taking of the said goods and chattels, in the said place in which, etc., and justly, etc., because he says, (*) that he, the plaintiff, (*or "the said G. H."*) did not hold or enjoy the said dwelling-house in which, etc., with the appurtenances, as tenant thereof to the defendant, (*or "the said E. F.,"*) under

¹Henry v. Eddy, 34 Ill. 508.

Krause v. Curtis, 73 Ill. 450; Lindley

²Morris on Replevin, 239; see v. Miller, 67 Ill. 244.

the said supposed demise thereof in the said avowry (or "cognizance") mentioned, in manner and form as the defendant has above in his said avowry (or "cognizance") in that behalf alleged: And this the plaintiff prays may be inquired of by the country, etc.¹

Under the issue *non demisit*, or "no rent in arrear," in replevin, the plaintiff may show that at the time he executed the lease he was owner of the land himself, but was induced to sign the lease by fraud and misrepresentation of the defendant.²

No. 176. *Plea in bar—to an avowry or cognizance for rent—"no rent in arrear."*

(*As in the last precedent, to the asterisk, and then proceed:*) that no part of the said rent in the said avowry (or "cognizance") mentioned, at the said time when, etc., was in arrear from the plaintiff to the defendant, (or "the said E.F.," in manner and form as the defendant has in his said avowry (or "cognizance") in that behalf alleged: And this the plaintiff prays may be inquired of by the country, etc.³

The plea of "no rent in arrear" admits the demise as well as the title of the defendant as laid in the avowry or cognizance.⁴ In replevin the issue is upon the right of possession at the commencement of the suit. And although, under the statute, the court will not deprive the plaintiff of actual possession, where he has, since the commencement of the suit, acquired a right to it, there is no rule by which he may have judgment for a return, upon the strength of an after-acquired lien.⁵

For other pleas, and for demurrers, see the forms in *Defenses to an Action, and Assumpsit, ante*.

Judgment for plaintiff.—Section 23 of the statute provides that "if judgment is given for the plaintiff in replevin, he shall recover damages for the detention of the property while the same was wrongfully detained by the defendant."⁶

¹ Morris Rep. 240.

² Robins v. Kichen, 8 Watts 390.

³ Morris on Replevin, 241.

⁴ Alexander v. Harris, 4 Cranch 299; Hill v. Miller, 5 S. & R. 355; Williams v. Smith, 10 S. & R. 202; Bloomer v. Juhel, 8 Wend. 448.

⁵ Ator v. Rix, 21 Ill. App. 309; see Hunter v. Whitfield, 89 Ill. 229; Mead v. Thompson, 78 Ill. 62; Wetzel v. Mayers, 91 Ill. 497; Prettyman v. Unland, 77 Ill. 206.

⁶ See King v. Ramsay, 13 Ill. 619; Matson v. Hanisch, 5 Bradw. 102.

Judgment for defendant—Retorno habendo.—Section 22 of the statute provides that “if the plaintiff in an action of replevin fails to prosecute his suit with effect, or suffers a nonsuit or discontinuance, or if the right of property is adjudged against him, judgment shall be given for a return of the property and damages for the use thereof from the time it was taken until a return thereof shall be made, unless the plaintiff shall, in the meantime, have become entitled to the possession of the property, when judgment may be given against him for costs and such damage as the defendant shall have sustained; or if the property was held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property.”¹

A judgment in replevin is binding only on the parties and their privies,² but is not binding upon a third person in whom the defendant may plead property.*

When, in a replevin suit, a return of the property is awarded, the plaintiff may return a part of the goods, provided they are separable from and in no way dependent upon the others for use or value, and if they are in the same condition as when taken, the defendant will be bound to receive them. Such a return will be a defense *pro tanto* to a suit on the bond.*

¹ See *McArthur v. Howett*, 72 Ill. 358; *Lill v. Stookey*, 72 Ill. 495; *Seabury v. Ross*, 69 Ill. 533.

² *Edwards v. McCurdy*, 13 Ill. 496.

³ *Ibid.*

⁴ *Edwin v. Cox*, 61 Ill. App. 567.

CHAPTER X.

TRESPASS.

Trespass, in its most extensive sense, means any transgression or offense against the person or property of another; and therefore all actions for such transgressions or offenses, though variously named, are, in fact, actions of trespass; but technically trespass signifies a wrong committed with violence.

At common law, where the act is willful and the injury immediate, trespass is the only remedy. But where the act is not willful, but the result of negligence, either *trespass* or *case* will lie, at the option of the plaintiff, even though the injury may be immediate.¹

A familiar example of trespass may be found in an assault and battery, or a carrying away of goods, or a forcible entry into a house, or upon lands, breaking open a door, or tearing down a fence. Such an act would be, in law, a trespass *vi et armis*, or, in the English phrase now used in pleadings, a trespass with force and arms. Early in the history of the law, a very slight degree of violence was sufficient to constitute this offense; and soon afterwards the courts held that it might be committed in some cases without any actual force whatever, implying by construction the force necessary to make it a trespass *vi et armis*, if the act was unlawful. Thus, for example, a peaceable entry into a house or land, with intent to take possession and oust the true owner, was regarded as a trespass *vi et armis*. And as there grew up a large and very important class of trespasses, in which there was neither actual nor constructive force, and to which the law of trespass with force and arms could not be made applicable by any construction, writs were devised whereby remedies might be given for such

¹ *Moreton v. Hardern*, 4 B. & C. 223; 3 Stephen's N. P. 2629.

wrongs. These writs were called, in law Latin, *brevia de transgressionem super casum*, and the form of action which grew out of the use of these writs is now called *trespass on the case*.

It is often a matter of importance, as well as of great difficulty, to determine whether the action, by which redress is sought for certain injuries, should be *trespass*, or *trespass on the case*; for if the plaintiff mistakes his form of action, he will meet with a nonsuit, and be subjected to costs. In some of the states of the Union, however, among others Illinois, the distinction between these actions has been abolished by statute, while in others the rigor of the distinction has been taken away or modified.

Trespass lies when the injury complained of is itself the wrong done by the defendant; while *trespass on the case* lies when the injury was consequential upon the wrong done, and flowed from it indirectly. For example, *trespass on the case* lies for an injury sustained by the plaintiff from the defendant's sale to him of unwholesome meat, or wine, especially where it was the business of the defendant to vend these things. So, for an injury caused by the want of skill of any person in the exercise of his profession, as a physician or attorney. There are many very nice and subtle distinctions in the law of trespass. It is certain that a man may begin by doing a right thing in a right way, and then so change his course as to do a wrong thing, or a right thing in a wrong way. In many of these cases, such person thus subsequently trespassing is regarded by the law as a trespasser *ab initio*, or as having been a trespasser through the whole of his conduct. Thus, if in the execution of legal process, an officer does something which is distinctly illegal, the law considers that he began to act with intent to do an illegal thing, and that all of his conduct was tainted by this intention, and was therefore illegal.

Many cases have turned, and much argument has been expended, upon this distinction. It is very doubtful whether any man can be made a trespasser *ab initio* by a subsequent wrongful act, unless he did the wrong while in the exercise of a strictly legal right, which the injured party had no right to resist. The rule seems to be confined, by the best authorities, to the cases of an officer of the law acting under a legal

warrant, and a guest of an inn. It is extended to the latter, because a licensed innkeeper, being bound by law to receive a guest, is then protected by the rule that if the guest, thus exercising his positive right of entry peaceably and without offense, while in the house does a wrong to the innkeeper, the offender shall be held to have entered the house for that purpose, and therefore to be a trespasser from his entrance.

The Illinois Practice Act, in force July 1, 1872, abolishes the distinction between the actions of trespass and trespass on the case; and provides that in all cases where trespass or trespass on the case was theretofore the appropriate form of action, either of those forms may be used, at the option of the plaintiff.¹ The subject of trespass will be further considered under the following heads: *1st, Injuries to the person; 2d, Injuries to personal property; 3d, Injuries to real property.*

I. INJURIES TO THE PERSON.

Trespass is the proper remedy for an assault and battery, wounding, imprisonment and the like; and it also lies for an injury to the relative rights, when occasioned by force, as for beating, wounding or imprisoning a wife or servant, by which the plaintiff has sustained a loss,² though the damage, the loss of service, etc., were consequential.

It is the only remedy for a menace to the plaintiff, attended with consequent damage,³ and for an illegal assault, battery, wounding, or imprisonment, when not under color of process.⁴ It lies for an assault with an attempt to commit a battery;⁵ and also when the battery, imprisonment, etc., were in the first instance lawful, but the party, by an unnecessary degree of violence, became a trespasser *ab initio*.⁶

¹ Rev. Stat. (1893), 1074; 2 Starr & Curtis 1787; Rev. Stat. (1895), 1158; see *Gay v. DeWerff*, 17 Ill. App. 417; *Blalock v. Randall*, 76 Ill. 224; *Krug v. Ward*, 77 Ill. 603; *Barker v. Koozier*, 80 Ill. 205; *Kimball v. Miller*, 54 Ill. App. 665.

² 1 Chit. Pl. (11 Ed.) 167.

³ 3 Black Com. 120; 1 Chit. Pl. (11 Ed.), 167.

⁴ *Schneider v. McLean*, 36 Barb. (N. Y.) 495; 1 Chit. Pl. 167.

⁵ 3 Penn. 176.

⁶ 1 Chit. Pl. (11 Am. Ed.), 167; *Pease v. Burt*, 3 Day, 485; *Elliott v. Brown*, 2 Wend. 497; *Hannen v. Edes*, 15 Mass. 347; *Bennett v. Appleton*, 25 Wend. 371; *Boles v. Pinkerton*, 7 Dana 453; *Smith v. Yocum*, 62 Ill. 354.

In the case of an assault and battery, both parties may be guilty of a breach of the peace, and may be indicted; but a civil action can not be brought by each against the other. And although the defendant may have been the aggressor, yet if the plaintiff not only used more force than was necessary for self-defense, but unnecessarily abused the defendant, he can not recover damages, but must pay damages.¹ Willfulness or intention on the part of the defendant to do an injury to the person of plaintiff is essential to the establishment of liability in an action of trespass for an assault and battery.²

Trespass lies for criminal conversation;³ and the right to sue is not defeated by the death of the wife before the action is brought.⁴ It may be maintained by a father for a forcible injury to his son;⁵ and it lies for seducing away a wife,⁶ or servant,⁷ or for debauching the latter,⁸ force being implied, and the wife and servant being considered as having no power to consent; and a count for beating the plaintiff's servant, *per quod servitium amisit*, may be joined with other counts in trespass;⁹ and though it has been usual to declare in case for debauching a daughter, it is now considered to be preferable to declare in trespass.¹⁰

Trespass will lie against a plaintiff suing out, or a magistrate issuing, void process, although not maliciously.¹¹ If a justice of the peace officiously, and without any complaint on oath, or personal knowledge, issues his warrant to apprehend a person,¹² or issues process in a cause where he has not jurisdiction, his proceedings are void, and he becomes a trespasser.¹³

Where a *capias* has been issued by a justice of the peace,

¹ *Elliott v. Brown*, 2 Wend. 497; but see *Dole v. Erskine*, 35 N. H. 503.

² *Razor v. Kinsey*, 55 Ill. App. 605; *In re Mullin*, 118 Ill. 551.

³ *Yundt v. Hartrunft*, 41 Ill. 9; *Lowe v. Massey*, 62 Ill. 47.

⁴ *Yundt v. Hartrunft*, 41 Ill. 9.

⁵ *Hammer v. Pierce*, 5 Harr. (Del.) 171.

⁶ *Yundt v. Hartrunft*, 41 Ill. 9; see *Lowe v. Massey*, 62 Ill. 47.

⁷ *Weedon v. Timbrell*, 5 Term. 361; 7 Mod. 81.

⁸ Bac. Abr. Trespass C. L.; *Beseler v. Stephani*, 71 Ill. 400.

⁹ 1 Chit. Pl. (11 Am. Ed.), 167.

¹⁰ *Akerley v. Haines*, 2 Caine 292; 2 Aiken 359; 2 M. & Sel. 436; 1 Chit. Pl. (11 Am. Ed.), 168.

¹¹ *Hayden v. Shed*, 11 Mass. 500; *Albee v. Ward*, 8 Mass. 79.

¹² *Flack v. Harrington*, Breese 213.

¹³ *Hull v. Blaisdell*, 1 Scam. 332; see *Moore v. Watts*, Breese 43 n.; *Miller v. White*, 80 Ill. 580; *Wilmer-ton v. Sample*, 42 Ill. App. 254.

without a sufficient oath, the person who has sued out the writ is not answerable in trespass *vi et armis*, the magistrate being the proper person to pass upon the sufficiency of the oath; nor would the magistrate be liable in *trespass*, if he had jurisdiction to issue the process.¹

Direct and immediate force, employed by one person against another without permission, with malice, constitutes a trespass, however slight the injury produced; but it is otherwise if force is used with permission.² A person who directs or invites the commission of a trespass, is guilty as a principal, and, when sued for the act, can not be permitted to show that the trespass would have been committed, without his interference,³ but one who approves of a trespass after it has been committed, is not in law a trespasser unless it was committed in his name or for his use.⁴

Where the defendant drove his carriage against the carriage of the plaintiff, on the public highway, by means whereof the plaintiff was thrown out and injured, it was held that the action for the injury to the plaintiff's person should be in trespass.⁵ An action of trespass will lie, in Illinois, against a steamboat, for an assault and battery committed by the mate or other officer of the boat on the person of a passenger, while such boat is navigating the rivers within or bordering upon the state.⁶

Where a sheriff, in order to arrest a debtor on execution, breaks open the outer door of his dwelling-house, the sheriff and those who aided in so doing are trespassers, though they act by command of the sheriff.⁷ Persons summoned by an offi-

¹ *Outlaw v. Davis*, 27 Ill. 467; *Blalock v. Randall*, 76 Ill. 224; *Bassett v. Bratton*, 86 Ill. 152; *Gay v. DeWerff*, 17 Brad. 417; *Lourey v. Hately*, 30 Ill. App. 297; *Wilmerton v. Sample*, 42 Ill. App. 254.

² *Cadwell v. Farrell*, 28 Ill. 438; *Harrison v. Ely*, 120 Ill. 83; *Atchison v. Dullam*, 16 Ill. App. 42.

³ *Coats v. Darby*, 2 Comst. 517; *Bell v. Miller*, 5 Ohio 251; see *Sund*

v. Block, 39 Ill. App. 564; *McVeagh v. Baily*, 29 Ill. App. 614; *Cudahy v. Powell*, 35 Ill. App. 31.

⁴ *Grund v. Van Vleck*, 69 Ill. 478; *Reed v. Rich*, 49 Ill. App. 262.

⁵ *Burdick v. Worrall*, 4 Barb. 596; 4 Barb. 596; see 1 Chit. Pl. (11 Am. Ed.), 128.

⁶ *Loy v. Aubrey*, 28 Ill. 412.

⁷ *Hooker v. Smith*, 19 Vt. 152; see 1 Chit. Pl. (11 Am. Ed.), 185.

cer to assist in the execution of a legal process, are justifiable in their acts to the same extent that the officer would be.¹

A private individual can not arrest a person on a mere suspicion that he has been guilty of a crime;² but if a crime has actually been committed, and the person accused is guilty, and there is danger of his escape, a private individual will be justified in making or causing the arrest of such accused person.³

Where there is well grounded suspicion that a person has committed a crime, and there is danger of an escape, an officer may, in his own bailiwick, arrest the suspected person, without a warrant.⁴ If a person enters the premises of another, and is requested to depart, but refuses so to do, the latter may eject the intruder, without incurring a liability as a trespasser, provided he uses no more force than is necessary for that purpose.⁵

Where a railroad conductor forcibly expels a passenger from a train, between the usual stopping places on the road, because the passenger refuses to pay his fare, the railroad company will be liable in trespass.⁶ At common law, actions for injuries to the absolute rights of the person, as for assaults, batteries, wounding, injuries to the health, liberty and reputation, could only be brought in the name of the person immediately injured, and if he died the remedy determined; or if the person who committed the injury died the suit likewise abated.⁷ In Illinois it is provided by statute that actions for injuries to the person (except slander and libel) shall survive.⁸

At common law, for injuries to the person or property of the wife, committed *before* marriage, where the cause of action

¹ *Payne v. Green*, 10 S. & M. 507; see *Elder v. Morrison*, 10 Wend. 128; *Oystead v. Shed*, 12 Mass. 506.

² *Kindred v. Stitt*, 51 Ill. 401; *Dodds v. Board*, 43 Ill. 95; *Lund v. Block*, 39 Ill. App. 553.

³ *Id.*; but see 3 Chit. Pl. 1081; 2 Swan's Pr. 780.

⁴ *Id.*; 1 Chit. Crim. Law 21; see 4 Bla. Com. 289; 1 Hale's P. C. 587.

⁵ *Woodman v. Howell*, 45 Ill. 387;

Phillips v. Springfield, 39 Ill. 83; *Ry. Co. v. Gastka*, 128 Ill. 613.

⁶ *Ry. Co. v. Peacock*, 48 Ill. 253; *R. R. Co. v. Latimer*, 128 Ill. 163.

⁷ 1 Chit. Pl. 60-68; *Reed v. R. R. Co.*, 18 Ill. 403; *Yundt v. Hart-runft*, 41 Ill. 9.

⁸ 1 Starr & Curtis An. Stat. 247; Rev. Stat. (1893) 129; Rev. Stat. (1895) 129; see *R. R. Co. v. O'Connor*, 19 Ill. App. 591.

would survive to the wife, or for injuries to the *person* of the wife *during* coverture, by battery, slander, etc., the husband and wife must join in the action; and if she dies before judgment therein it will abate.¹ But if, after judgment, the wife dies, the judgment survives to the husband.² Actions for torts committed by a woman *before* her marriage, or for torts committed by the wife *during* coverture, as for an assault, slander, etc., must be brought against the husband and wife jointly. In trespass against husband and wife for her tort before coverture, or a wrong committed by her alone during coverture, if she dies before judgment, the suit will abate; but if the husband dies, or becomes bankrupt, her liability will continue.³

In Illinois, by virtue of the statute of 1861, a married woman may sue alone for personal injuries.⁴

II. INJURIES TO PERSONAL PROPERTY.

The action of trespass lies either for an unlawful taking of a personal chattel, or for an injury to such chattel while in the possession of the general owner, or of a person having a special property in it, as a bailee.⁵ For most unlawful *takings* this action is a concurrent remedy with trover;⁶ and it is held that trespass for taking goods may be sustained by proof that the defendant unlawfully exercised authority over them, against the will and to the exclusion of the owner,⁷ although there was no manual taking or removal of the goods.⁸ Trespass lies against an officer who takes the goods of the owner under an execution or attachment against a third person.⁹

The taking of goods by an officer, as such, but without au-

¹ 1 Chit. Pl. (11 Am. Ed.) 67, 73.

² *Stroop v. Swarts*, 12 S. & R. 76.

³ 1 Chit. Pl. (11 Am. Ed.) 92, 93.

⁴ Rev. Stat. (1895) 855; *Chestnut v. Chestnut*, 77 Ill. 346; *City v. McGraw*, 75 Ill. 566.

⁵ 1 Chit. P. (11 Am. Ed.), 168, 171; *Wright v. Ramscot*, 1 Saund. 84; *Brown v. Folwell*, 3 Halst. 593; *Gibbs v. Chase*, 10 Mass. 130; see *Frankenthal v. Camp*, 55 Ill. 169.

⁶ 1 Chit. P. (11 Am. Ed.) 171.

⁷ *Dexter v. Cole*, 6 Wis. 319.

⁸ *Miller v. Baker*, 1 Met. 27.

⁹ *Gauch v. Mayer*, 27 Ill. 134; *Markley v. Rand*, 12 Cal. 275; *Nagle v. Mullison*, 34 Penn. 48; *Trieber v. Blocher*, 10 Md. 14; *Hesing v. McCloskey*, 37 Ill. 341; 1 Chit. Pl. (11 Am. Ed.) 185; *Locke v. Duncan*, 53 Ill. App. 373; *Ilg v. Burbank*, 59 Ill. App. 291; *Windmiller v. Chapman*, 38 Ill. App. 276; *Pike v. Colvin*, 67 Ill. 227.

thority of law, is a trespass.¹ And where an officer, under process of law, sells personal property before or after the time prescribed by law,² or sells the entire property in goods owned by two jointly under an execution against one of them,³ or in any other manner abuses his legal authority he becomes a trespasser *ab initio*.⁴ And an officer is liable in trespass if he seizes goods under an execution and advertises them for sale, but neglects to sell them.⁵

If a distress warrant is executed in the night time it is a trespass.⁶

The statute of Illinois,⁷ in force July 1, 1872, provides, that "if any officer, by virtue of any execution or other process, or any other person, by any right of distress, shall take or seize any of the articles of property exempted by the statute from levy and sale, such officer or person shall be liable to the party injured for double the value of the property illegally taken or seized, to be recovered by action of trespass, with costs." This provision is similar to that contained in the act of February 22, 1861.⁸ The defendant in execution, in such case, may proceed against the officer who seizes his property exempted by the statute, either for double the value, or the simple value of the property seized.⁹ If he declares in the common form of the action of trespass, without any reference to

¹ *Stewart v. Wells*, 6 Barb. 19.

² *Smith v. Gates*, 21 Pick. 55; *Pierce v. Benjamin*, 14 Pick. 356; *Purrington v. Loving*, 7 Mass. 388; *Carnrick v. Myers*, 14 Barb. 9; *Vail v. Lewis*, 4 Johns. 450; *Barley v. Tipton*, 29 Mo. 206; *Stetson v. Goldsmith*, 30 Ala. 602; *Stetson v. Goldsmith*, 31 Ala. 649; *Emory v. Hapgood*, 7 Gray 55; *Williams v. Ives*, 25 Conn. 568; *Carrier v. Esbaugh*, 70 Pa. St. 239.

³ *Smyth v. Tankersley*, 20 Ala. 212; *Markley v. Rand*, 12 Cal. 275.

⁴ *Jarratt v. Gwathmey*, 5 Blackf. 237; *Lear v. Montross*, 50 Ill. 508; *Brush v. Fowler*, 36 Ill. 53; *Snydacker v. Bross*, 51 Ill. 357; *Perkins*

v. Thornburgh, 10 Cal. 189; *Melville v. Brown*, 15 Mass. 82; see Chit. Pl. 179, 185; *Hesing v. McCloskey*, 37 Ill. 341.

⁵ *Bond v. Wilder*, 16 Vt. 393; *Freeman v. Smith*, 30 Penn. 264.

⁶ *Sherman v. Dutch*, 16 Ill. 283; Arch. Land. & Ten. 119.

⁷ 1 Starr & Curtis 114; Rev. Stat. (1893) 727; Rev. Stat. (1895) 775; see *Clinton v. Kidwell*, 82 Ill. 427; *Race v. Oldridge*, 90 Ill. 250.

⁸ Gross' Stat. 584.

⁹ *Cornelia v. Ellis*, 11 Ill. 584; *Amend v. Murphy*, 69 Ill. 337; *Washburn v. Goodheart*, 88 Ill. 229; *Figueira v. Pyatt*, 88 Ill. 402; *Heckle v. Grewe*, 125 Ill. 58.

the statute, he is only entitled to recover simple damages for the trespass; if he claims the penalty, he should declare specially on the statute. The statute only gives the penalty against the officer levying the execution; the plaintiff in the execution can not be made a party to the suit.¹

The interest of a tenant in common in personal property stands upon the same footing in respect to exemption laws as like interests in other property, where the possession as well as the title is several.²

Trespass lies for any immediate injury to personal property, occasioned by actual or implied force, though the wrongdoer may not take away or dispose of the property; as, for shooting or beating a dog, or other live animals; or for hunting or chasing horses, cattle, etc.³ If, however, a person is injured by the dog of another, or the peace and quiet of his family are disturbed by it, and there is no other way of preventing it, he may kill the dog without becoming liable.⁴ So a person is justifiable in killing an enraged bull in the necessary defense of himself or of his family.⁵

It is not in general necessary, in order to maintain this action, that the injurious act should have been done with a wrongful intent.⁶ It is sufficient that the act was committed without justifiable cause, though accidentally or by mistake.⁷ But in some cases, as in actions against public agents, the intent may be frequently material in determining the question of liability.⁸ And when a sheriff, after a secret act of bankruptcy committed by A., takes his goods under an execution against him, the sheriff can not be sued by the assignees in

¹ *Pace v. Vaughn*, 1 Gilm. 30; see *Bingham v. Maxey*, 15 Ill. 290; *Campbell v. Conover*, 26 Ill. 64; *Waldo v. Gray*, 14 Ill. 184.

² *Heckler v. Grewe*, 125 Ill. 58.

³ 3 Bla. Com. 153; *Wood v. LaRue*, 9 Mich. 158; *Amick v. O'Hara*, 6 Blackf. 258; *Cantrell v. Adderholt*, 28 Geo. 239; *Roby v. Reed*, 39 N. H. 461; *Painter v. Baker*, 16 Ill. 103; *Brent v. Kimball*, 60 Ill. 211; *Reynolds v. Phillips*, 13 Ill. App. 557; *Burt v. Blake*, 14 Ill. App. 324.

⁴ *Brill v. Flagler*, 23 Wend. 354; *Leonard v. Wilkins*, 9 Johns. 233; *King v. Kline*, 6 Barr. 318; *Spray v. Amerman*, 66 Ill. 309.

⁵ *Russell v. Barrow*, 7 Porter 106.

⁶ 2 Hill on Torts 74; 1 Chit. Pl. 130, 166; Wat. on Tres. § 14 *et seq.*

⁷ 2 Hill on Torts 74; *Cate v. Cate*, 44 N. H. 211; *Dexter v. Cole*, 6 Wis. 319; see *Paxton v. Buyer*, 67 Ill. 132.

⁸ 1 Chit. Pl. 130, 77; 6 Taunt. 29; *Hull v. Smith*, 2 Bing. 156; M. & Sel. 27.

trespass, but only in trover, because such officers ought not to be made trespassers by relation.¹

When one sues and recovers in replevin, and gets a return of the property, he can not afterwards sue the same defendant and another person in trespass, for the same transaction, no matter whether the damages in replevin have been paid or not.² The validity of a tax may be brought in question by an action of trespass.³ The fact that the plaintiff in an action of trespass kept a bawdy house, is no defense for entering the house and carrying away the goods therefrom.⁴

Who may maintain the action.—Possession, actual or constructive, with property in the chattel, general or qualified, is necessary to sustain trespass.⁵ But a person who has the absolute or general property may support this action although he has never had the actual possession, or although he has parted with the possession to a carrier, servant, etc., giving him only a bare authority to carry or keep, etc., not coupled with an interest in the property.⁶ And executors and administrators may support trespass for an injury to personal property, committed after the death of the testator or intestate, and before the probate or administration was granted; and so may a legatee, after the executor has assented to the legacy, for an injury done before such assent.⁷

The general property in goods and chattels, *prima facie*, for all civil purposes, draws to it the possession;⁸ but if the

¹ Chit Pl. 130; *Smith v. Milles*, 1 Term. 480.

² *Karr v. Barstow*, 24 Ill. 580.

³ *McClaghry v. Gratzenberg*, 39 Ill. 117.

⁴ *Love v. Moynahan*, 16 Ill. 277.

⁵ *Brainard v. Burton*, 5 Vt. 97; *Sampson v. Henry*, 11 Pick. 382; *Daniels v. Pond*, 21 Pick. 367; *Stuyvesant v. Tompkins*, 9 Johns. 61; *Hoyt v. Geiston*, 13 Johns. 141; *Getston v. Schenck*, 13 Johns. 561; *Clark v. Carleton*, 1 N. H. 110; *Root v. Chandler*, 10 Wend. 110; *Hume v. Tufts*, 6 Blackf. 136; *Cannon v. Kinney*, 3 Scam. 10; see *Craig v. Gilbreth*, 47 Maine 416.

⁶ 1 Chit. Pl. 169; *Gordon v. Harper*, 7 Term. 12; *Bertie v. Beaumont*, 16 East 33; *Strong v. Adams*, 30 Vt. 221; *Overby v. McGee*, 15 Ark. 459; *Thorp v. Burling*, 11 Johns. 285; *Tarry v. Brown*, 34 Ala. 159.

⁷ Bac. Abr., Executor, n. 1; *Wilbraham v. Snow*, 2 Saund. 47, a; 1 Chit. Pl. 169.

⁸ *Bird v. Clark*, 3 Day 272; *Buckley v. Dolbear*, 7 Conn. 235; *Gauche v. Mayer*, 27 Ill. 134; *Walcott v. Pomeroy*, 2 Pick. 121; *Ayer v. Bartlett*, 9 Pick. 156; *Howe v. Keeler*, 27 Conn. 538.

general owner parts with his possession, and the bailee, at the time when the injury is committed, has the exclusive right to use the property, the inference of possession is rebutted, and the right of possession being in reversion, the general owner can not support trespass.¹ If, however, property is loaned for an indefinite time, the owner may maintain the action against a person who takes it tortiously.²

Possession of personal property is evidence of ownership, and the possessor may recover in trespass against any person who may take it from him, unless such person has a paramount right to the possession of such property.³ Where standing crops are sold, the possession is constructively in the purchaser until it is time to harvest them, for the law does not require him to take manual possession of them until that time.⁴ And in such case the purchaser is not only entitled to a reasonable time after the crop matures, to gather it, but before the vendor can rightfully turn his cattle into the field he must give reasonable notice to the purchaser.⁵

An officer has, by virtue of a seizure on execution or attachment, sufficient property in the goods seized to maintain trespass;⁶ but the plaintiff in execution or attachment, or the officer's custodian or receiptor, has not.⁷ The possession of property levied upon, in the hands of a custodian, is the possession of the officer so placing it, and he may maintain trespass against one who removes the same.⁸

¹ *Putnam v. Wyley*, 8 Johns. 432; *Van Brunt v. Schenck*, 11 Johns. 385; *Buckley v. Dolbear*, 7 Conn. 235; *Soper v. Sumner*, 5 Vt. 274; *Hart v. Hyde*, 5 Vt. 328; *Cannon v. Kinney*, 3 Scam. 10; *Gay v. Smith*, 38 N. H. 171; *Walker v. Wilkerson*, 35 Ala. 725; 1 Chit. Pl. 169.

² *Cannon v. Kinney*, 3 Scam. 10.

³ *Gilson v. Wood*, 20 Ill. 37; *Berger v. Riggs*, 34 Ill. 173; *Williams v. Bridge*, 14 La. An. 732; *Craig v. Gilbreth*, 47 Me. 416; *Demick v. Chapman*, 11 Johns. 132; *Cook v. Howard*, 13 Johns. 275; *Potter v. Washburn*, 13 Vt. 558; *Barker v. Chase*, 24 Me.

230; *Tarry v. Brown*, 34 Ala. 159; *Hendricks v. Decker*, 35 Barb. 298.

⁴ *Bull v. Griswold*, 19 Ill. 631.

⁵ *Ogden v. Lucas*, 48 Ill. 492.

⁶ *Brownell v. Manchester*, 1 Pick. 232; *Bond v. Padelford*, 13 Mass. 394; *Root v. Chandler*, 10 Wend. 110; *Browning v. Skillman*, 4 Zab. (N. J.) 351; *Burt v. Blake*, 14 Bradw. 334; *Hanchett v. Ives*, 33 Ill. App. 471.

⁷ *Ladd v. North*, 2 Mass. 514; *Bond v. Padelford*, 13 Mass. 394.

⁸ *Hanchett v. Ives*, 33 Ill. App. 471; *Brownell v. Manchester*, 1 Pick. 252; *Thorpe v. Burling*, 11 Johns. 285.

Against whom it will lie, etc.—This action will lie not only against individuals, but municipal corporations.¹ So a railroad company is liable if its servants or lessees, or the contractors for the construction of the road, in using or building such road commit a trespass.²

Where several persons commit a trespass they are jointly and severally liable, and the acts, declarations and knowledge of any one of them may be chargeable upon all, if they are shown to have acted in concert.³ In this action there are no accessories. The person who commands or approves is equally guilty with the one who performs the act;⁴ and if the evidence authorizes exemplary damages against one, the other, if he is shown to have acted in concert with him, is liable to the same extent.⁵ The jury can not discriminate between joint trespassers and assess damages against them severally, according to the relative enormity of their offenses,⁶ but the jury may find one defendant guilty and acquit the other.⁷

An attorney, acting in such capacity merely, and in good faith, is not liable in trespass for seizing goods, but if he assists in any other capacity he is equally liable with others participating in an unlawful seizure.⁸

III. INJURIES TO REAL PROPERTY.

Trespass is the proper remedy for a wrong done by breaking through an inclosure, and coming into contact with any corpo-

¹ *Allen v. City*, 23 Ill. 332; *R. R. Co. v. Wright*, 5 Ind. 252; *Main v. R. R. Co.*, 12 Rich. (S. C.) 82.

² *R. R. Co. v. Whipple*, 22 Ill. 105; see *Allen v. City*, 23 Ill. 332; *McCormick v. Tate*, 20 Ill. 334; *R. R. Co. v. McCarthey*, 20 Ill. 385; *Halligan v. R. R. Co.*, 15 Ill. 558; *Tel. Co. v. Satterfield*, 34 Ill. App. 386.

³ *Ousley v. Hardin*, 23 Ill. 403; *Hair v. Little*, 28 Ala. 236; *Sartin v. Saling*, 21 Mo. 387; *Smithwick v. Lord*, 7 Jones (N. C.) 64.

⁴ *Whitney v. Turner*, 1 Scam. 253; *Gilson v. Wood*, 20 Ill. 37; *Oleson v. Upsahl*, 69 Ill. 273; *Develing v. Sheldon*, 83 Ill. 390; *Cudahy v. Powell*, 35 Ill. App. 29.

⁵ *Hair v. Little*, 28 Ala. 236; *Clark v. Bales*, 15 Ark. 452; see *Whitney v. Turner*, 1 Scam. 253; *Grund v. Van Vleck*, 69 Ill. 478.

⁶ 2 Hill, Torts, 315; *Carney v. Reed*, 11 Ind. 417; *Clark v. Bales*, 15 Ark. 452; *Layman v. Hendrix*, 1 Ala. 212; but see cases cited *contra*, 2 Hill on Torts, 316.

⁷ 2 Hill on Torts, 312; *McCarron v. O'Connell*, 7 Cal. 152; *Brady v. Ball*, 14 Ind. 317; *Terpenning v. Gallup*, 8 Clarke (Iowa) 74; *Gillerson v. Small*, 45 Me. 17.

⁸ *Arnold v. Phillips*, 59 Ill. App. 213; *Hardy v. Keeler*, 56 Ill. 152.

real hereditament of which another is the owner and in possession, whereby a damage has ensued. There is an ideal fence, extending upwards and downwards indefinitely, which encircles every man's land; the entry, therefore, is breaking through this inclosure, and this generally constitutes by itself a right of action. There must have been some injury, however, to entitle the plaintiff to recover, for a man in a balloon may legally be said to break the close of the plaintiff, when he passes over it as he is wafted by the wind, but as the owner's possession is not by that act incommoded, trespass could not probably be maintained; yet if any part of the machinery should fall upon the land, the æronaut could not justify an entry to remove it, which proves that the act is not justifiable.¹ But the slightest injury, as treading down the grass, is sufficient.²

It is not requisite, to maintain the action, that there should have been a wrongful intent in committing the injurious act.³ The action will not lie against firemen who, in an effort to extinguish a fire and save property, forcibly enter a building in the absence of the owner.⁴

Where an injury is occasioned by the digging of a ditch on one's own land, whereby water is thrown upon the land of another, the remedy of the latter is case, and not trespass.⁵

An action for entering upon the close of the plaintiff is sustained by proof of a trespass upon any part of the close described.⁶

A person who enters upon land without any claim or color of right or title, and keeps possession, is a trespasser.⁷ Any person may remove a fence erected across a highway, without

¹ *Bouv. Law D.* 601; *Guille v. Swan*, 19 Johns. 381.

² *Cortelyou v. Van Brunt*, 2 Johns. 357; *Stewart v. Dougherty*, 9 Johns. 113; *Clap v. Draper*, 4 Mass. 266; see 1 Chit. Pl. 159; *Pfeiffer v. Grossman*, 15 Ill. 53.

³ 1 Chit. Pl. 150; *Roche v. Light Co.*, 5 Wis. 55; 2 Greenl. Ev., Sec. 622; *Higginson v. York*, 5 Mass. 341; *Hayden v. Shed*, 11 Mass. 500; *Beyer*

v. Tanner, 29 Ill. 135; see *Pfeiffer v. Grossman*, 15 Ill. 53.

⁴ *Gibson v. Leonard*, 143 Ill. 182; Cooley on Torts, 313; *Proctor v. Adams*, 113 Mass. 376.

⁵ *Winkler v. Meister*, 40 Ill. 349.

⁶ *Procter v. Sullivan*, 7 Gray 441; *Knowles v. Dow*, 20 N. H. 135; see 2 Greenl. Ev., Sec. 618, a.

⁷ *Noble v. Smith*, 2 Johns. 52.

being guilty of a trespass.¹ Where a road, after its survey and location, has not been opened for the use of the public, nor the proper notice given to the owner of the land to remove his fence, neither the commissioners nor any other person can remove the fence without becoming trespassers.²

Where a party, without any search warrant, or other authority of law, enters the rooms of another, searches the same and seizes therein evidences of the commission of crime, the act will be in violation of the civil rights of the latter, and a trespass, for which the former may be held liable in a civil action.³

A railway company has no right to the possession of land for its right of way until the damages for the taking have been assessed and paid, and if it takes possession before such assessment and payment, without the owner's consent, it is a trespasser, and the owner may bring ejectment or trespass, or both, and recover his property, and such damages as he may have sustained by the unlawful act.⁴

The nature of the real property affected must in general be something tangible and fixed, such as a house, a room, an out-house or other building, or land; but the term *close* is technical, and signifies the interest in the soil, and not merely a close or inclosure in the common acceptance of that word.⁵

To maintain an action of trespass to real estate, the plaintiff must have the actual or constructive possession,⁶ and though the title may come in question, it is not essential that it should.⁷ Any person in the actual possession of land, though without any other title, may maintain the action against a

¹ Bac. Abr., Highways, E; *Marcy v. Taylor*, 19 Ill. 634.

² *Taylor v. Marcy*, 25 Ill. 518; see *Proctor v. Town*, 25 Ill. 153; *Pool v. Breese*, 114 Ill. 594.

³ *Gindrat v. People*, 133 Ill. 103.

⁴ *R. R. Co. v. Gates*, 120 Ill. 86.

⁵ *Stammers v. Dixon*, 7 East 207; *Harrison v. Parker*, 6 East 154.

⁶ *Dean v. Comstock*, 32 Ill. 173; 2 Greenl. Sec. 614; see *Coal Co. v.*

Caldwell, 17 Ill. App. 409; *Lodge v. Klein*, 115 Ill. 177; *Lee v. Town*, 118 Ill. 304; *Webb v. Sturtevant*, 1 Scam. 181; *R. R. Co. v. Woosley*, 85 Ill. 370; *Miller v. Kirby*, 74 Ill. 242; *Ry. Co. v. Beach*, 29 Ill. App. 157; *Faith v. Yocum*, 51 Ill. App. 620.

⁷ See *Dean v. Comstock*, 32 Ill. 173; *Alderman v. Directors*, 91 Ill. 179; *Shoup v. Shields*, 116 Ill. 488.

stranger,¹ but not against a person having concurrent possession.²

In Illinois, it is held that he may maintain it against the owner of the legal title,³ as the owner has no right to make a forcible entry, even against a tenant holding over, or upon any other person wrongfully in possession. The law in such cases (the statute of forcible entry and detainer) has given him a remedy, and he must resort to it.⁴

A trespasser or person in possession as a wrongdoer can not recover against the owner of the fee, with right of possession.⁵ The possession, where that is alone relied on, must be an actual and not a constructive possession.⁶ While it is true that the action can only be maintained for an injury to the possession, yet it is not necessary that such possession should be visible and actual, for unless there is an adverse occupancy, the ownership in fee draws to it the legal possession.⁷

If the premises are actually occupied, the action must be brought by the person in possession; if they are vacant and unoccupied, the person having the legal title has the right to possession, and must bring the action.⁸ In the latter case, the real owner has the constructive possession.⁹ But if the plaint-

¹ *Inhab. v. Thacher*, 3 Metc. (Mass.) 239; *Parish v. Smith*, 14 Pick. 297; *Kempton v. Cook*, 4 Pick. 305; *Weimer v. Lowery*, 11 Cal. 104; *Albin v. Lord*, 39 N. H. 196; *Oglesby v. Stodghill*, 23 Geo. 590; *Dean v. Comstock*, 32 Ill. 173; *Allen v. Taft*, 6 Gray 552; *Carney v. Reed*, 11 Ind. 417; *Wiggins v. Chance*, 54 Ill. 175.
² *Inhab. v. Thacher*, 3 Metc. (Mass.) 239.

³ *Smith v. Price*, 42 Ill. 399; *R. R. Co. v. Cobb*, 68 Ill. 53.

⁴ *Farwell v. Warren*, 51 Ill. 467; *Reeder v. Purdy*, 41 Ill. 279; *Page v. DePuy*, 40 Ill. 506; *Reeder v. Purdy*, 48 Ill. 261. But see *Hoots v. Graham*, 23 Ill. 81; *Okeson v. Patterson*, 29 Penn. St. 22; *Haskins v. Haskins*, 67 Ill. 446; *Hubner v. Feige*, 90 Ill. 208.

⁵ *Hoots v. Graham*, 23 Ill. 81; *Frazier v. Carruthers*, 44 Ill. App. 61; *Harding v. Sandy*, 43 Ill. App. 442; *White v. Naerup*, 57 Ill. App. 114.

⁶ *Webb v. Sturtevant*, 1 Scam. 181; *Zell v. Ream*, 31 Penn. St. 304; *Larue v. Gaskins*, 5 Cal. 164; see *Winkler v. Meister*, 40 Ill. 349.

⁷ *Barber v. Trustees*, 51 Ill. 396; see *Wells v. Howell*, 19 Johns. 385; *Hunnewell v. Hobart*, 42 Me. 565.

⁸ *Dean v. Comstock*, 32 Ill. 173; *Halligan v. Ry. Co.*, 15 Ill. 560; *Wickham v. Freeman*, 12 Jones 183; *Austin v. Sawyer*, 9 Cow. 39; *Chat-ham v. Brainerd*, 11 Conn. 60; *Kempton v. Cook*, 4 Pick. 305; *Shepard v. Pratt*, 15 Pick. 32; *Shipman v. Baxter*, 21 Ala. 456.

⁹ *Cook v. Foster*, 2 Gilm. 652;

iff fails to show paramount title, or possession, at the time the injuries were committed, he can not recover.¹

A tenant at sufferance can not, by the common law, have trespass *quare clausum fregit* against his landlord,² and a lessor can not maintain trespass against a stranger while there is a tenant in possession.³

Trespass being a possessory action, it is not necessary that the title should come in question. But if it does come in question, as under a plea of *liberum tenementum*, and the plaintiff has neither a right to the property nor to the possession, the owner of the fee has the right of entry, and will not be liable in trespass for exercising the right in a peaceable manner.⁴

Where a person who has entered upon land, under a parol agreement for the purchase of the same, cuts trees, and afterwards rescinds the agreement, he is a trespasser.⁵

Where the owner of land agrees with another that he may sow the land on shares, they may maintain a joint action of trespass against a third person, who cuts and carries away the crop.⁶

The owner of real estate in the possession of a lessee, other than at will, can not maintain trespass for an injury to his reversionary interest;⁷ but he can where the lease is at will only.⁸ Trespass will lie, by the owner of real estate, against a person committing waste by permission of the tenant at will.⁹ But it will not lie for the reversioner against a person

Gauche v. Mayor, 27 Ill. 134; *Gleason v. Edmunds*, 2 Scam. 448; *Turpenning v. Gallup*, 8 Clarke 74; *Safford v. Basto*, 4 Mich. 406; *Hubbell v. Rochester*, 8 Cow. 115; *Van Deusen v. Young*, 29 Barb. 9; *Warren v. Cochran*, 10 Foster 379.

¹ *Rockwell v. Jones*, 21 Ill. 279.

² *Sampson v. Henry*, 13 Pick. 36; *Hyatt v. Wood*, 4 Johns. 150; *Farwell v. Warren*, 51 Ill. 467.

³ *Campbell v. Arnold*, 1 Johns. 511; *Lienow v. Ritchie*, 8 Pick. 235; *Sutton v. Westcott*, 3 Jones (N. C.) 283; *Lyford v. Toothaker*, 39 Me. 28.

⁴ *Dean v. Comstock*, 32 Ill. 173; *Wilecox v. Kinzie*, 3 Scam. 218; *Cook v. Foster*, 2 Gilm. 652; *Galt v. Ry. Co.*, 157 Ill. 132.

⁵ *Suffern v. Townsend*, 9 Johns. 35; *Lyford v. Putnam*, 35 N. H. 563.

⁶ *Foot v. Colvin*, 3 Johns. 216.

⁷ *Lieno v. Ritchie*, 8 Pick. 235; *Taylor v. Townsend*, 8 Mass. 411; *Wickham v. Freeman*, 12 Johns. 183; *Todd v. Jackson*, 2 Dutch. (N. J.) 525.

⁸ *Starr v. Jackson*, 11 Mass. 519; *Inhab. v. Sprague*, 15 Pick. 102; *George v. Fisk*, 32 N. H. 32.

⁹ *Daniels v. Pond*, 21 Pick. 367.

committing waste under the authority of a tenant in dower,¹ or for life.²

After an entry on a tenant at sufferance, the owner may have trespass *quare clausum fregit* against him,³ but not before.⁴ A person disseized can not, until entry, maintain trespass.⁵ An overseer of highways, in an action of trespass against him, can not justify his trespass by showing an order from the commissioners to open a road, where a road or highway has not been legally laid out.⁶

Since the enactment of the statute of 1874 the rule of the common law, which requires the owner of cattle to keep them on his own land, is in force in Illinois, and he is answerable for their trespasses.⁷ Where a township, under the township organization laws, has adopted rules prohibiting cattle from running at large, and there are no regulations requiring fences, the owner of such cattle is liable for injuries occasioned by them in uninclosed fields;⁸ and trespass may be brought to recover for such injuries, although prohibiting ordinance of the town provides a special remedy.⁹

Where the owner of domestic animals is guilty of trespass in permitting or allowing such animals to enter his neighbor's close and do damage, he is chargeable with the consequential damages sustained by the plaintiff growing out of such trespass to his premises, whether the owner had or had not notice that the animals had a vicious propensity to do the particular act.¹⁰

¹ *Shattuck v. Gragg*, 23 Pick. 88; *Taylor v. Townsend*, 8 Mass. 411.

² *R. R. Co. v. Goodwin*, 111 Ill. 273.

³ *Dorrell v. Johnson*, 17 Pick. 263; *King v. Baker*, 25 Penn. St. 186.

⁴ *Rising v. Stannard*, 17 Mass. 282; *Mayo v. Fletcher*, 14 Pick. 525; *Danforth v. Sargeant*, 14 Mass. 491.

⁵ *Bigelow v. Jones*, 10 Pick. 161; *Allen v. Thayer*, 17 Mass. 299; *Blood v. Wood*, 1 Met. 528.

⁶ *Dunning v. Matthews*, 16 Ill. 308; *Guptail v. Teft*, 16 Ill. 365;

Beyer v. Tanner, 29 Ill. 135; *Caldwell v. Evans*, 85 Ill. 170.

⁷ *Bulpit v. Matthews*, 145 Ill. 345; *Selover v. Osgood*, 52 Ill. App. 260; *McKowan v. Harmon*, 56 Ill. App. 368; *Misner v. Lighthall*, 13 Ill. 609; *Seelcy v. Peters*, 5 Gilm. 130; see *Durham v. Goodwin*, 54 Ill. 469; *Westgate v. Carr*, 43 Ill. 450; *Scott v. Buck*, 85 Ill. 334; *Ozburn v. Adams*, 70 Ill. 291.

⁸ *Westgate v. Carr*, 43 Ill. 450; *Bedden v. Clark*, 76 Ill. 338.

⁹ *Ames v. Carleton*, 41 Ill. 261.

¹⁰ *Lee v. Burk*, 15 Ill. App. 651.

COMMENCEMENT OF THE ACTION.

An action of trespass, like most other personal actions at law, is commenced by suing out a summons, or a *capias ad respondendum*; and in some cases, security for costs is required.

The declaration.—The declaration should state, first, the *matter* or *thing* affected; second, the plaintiff's *right* thereto; third, the *injury*; and fourth, the *damage* sustained by the plaintiff.¹

1st. *The matter or thing affected.*—In actions brought for injuries to real property, the quality of the realty, as whether it consists of houses, lands or other corporeal hereditaments, should be shown.² In trespass to lands, the term *close* is proper, although the ground is not inclosed, as it imports the exclusive right of possession and interest in the soil.³

In actions for injuring or taking away goods and chattels, it is generally necessary to state their quality, quantity or number, and value;⁴ the assigned reason being that a former recovery could not otherwise be pleaded in bar of a second action for the same goods, neither could the defendant properly defend himself.⁵ Therefore it is in general insufficient, even after judgment by default or verdict, to allege that the defendant injured or took, etc., “divers goods and chattels” of the plaintiff, without giving any description of them.⁶

In trespass, trover and case, less particularity is required than in detinue and replevin, because it is only in the two latter forms of action that the plaintiff can claim or recover the goods themselves.⁷ In the three former actions, damages only are recoverable, and the specification of quality and quantity in a general way is allowed; as “four horses,” “two packs of flax,” “two ricks of hay,” a “library of books,” etc.⁸

¹ 1 Chit. Pl. (11 Am. Ed.) 376.

² *Id.*; And. Steph. Pl. 338.

³ 1 Chit. Pl. (11 Am. Ed.) 376; *Stammers v. Dixon*, 7 East 204; Vin. Abr., Fences.

⁴ 1 Chit. Pl. (11 Am. Ed.) 377; And. Steph. Pl. 337; *Taylor v. Wells*, 2 Saund. 74.

⁵ M'Cl. 278; *Keeber v. Hicker*, 11 East 576.

⁶ *Pope v. Tilman*, 7 Taunt. 642.

⁷ *Taylor v. Wells*, 2 Saund. 74; 1 Chit. Pl. (11 Am. Ed.) 377.

⁸ *Beaumont v. Yantz*, Breese 26; *Donaghe v. Rondeboush*, 4 Munf. 251; *Taylor v. Wells*, 2 Saund. 74.

Perhaps less particularity may be required where the *gravamen* or gist of the action is the breaking and injuring of a house, etc., and the injury to goods is laid chiefly as aggravation; as trespass for breaking, etc., a house, and taking "several keys" belonging to the doors thereof,¹ or damaging "the goods and chattels therein," and wrenching open and injuring "the doors thereof."²

With respect to the quality or species of the goods, the plaintiff is perhaps bound to prove the fact as laid;³ but with regard to the quantity or number and value of the goods, he may prove less than he charges in his declaration, but he can not prove more, although the statement is under a *videlicet*; as, if the declaration is for "divers, to wit, ten horses," he may show an injury to one horse, but not to eleven horses.⁴ It is therefore prudent to lay the quantity to an extent clearly adequate to cover the largest possible amount, but at the same time according to the facts.⁵

2d. *The plaintiff's right or interest.*—It is laid down as a fundamental rule, in showing title in actions *ex delicto*, that against a mere wrong-doer, or person apparently having no color or right, mere possession suffices, and a special statement of title is unnecessary.⁶ In trespass, trover, detinue, case or replevin, for injuring or taking away goods, etc., the plaintiff's right to or interest in the goods, either as absolute owner or as having a limited right therein, is not otherwise described in the declaration than by the averment that they were the goods "of the plaintiff," or that he was "lawfully possessed of them, as of his own property." When the plaintiff has not a possessory right, and his interest in the chattel is reversionary, it must be expressly so described in the declaration, which must then be framed in case.⁷

¹ *Layton v. Grindall*, Salk. 643; *Taylor v. Wells*, 2 Saund. 74.

² 1 Chit. Pl. (11 Am. Ed.) 378; *Chamberlain v. Greenfield*, 3 Wils. 292; And. Steph. Pl. 339.

³ Stephen (2 Ed.), 352; 1 Chit. Pl. (11 Am. Ed.) 378.

⁴ See *Crispin v. Williamson*, 8 Taunt. 107; *Beaumont v. Yantz*,

Breese, 26; *Donaghe v. Rondeboush*, 4 Munf. 251.

⁵ 1 Chit. Pl. (11 Am. Ed.), 378.

⁶ 1 Chit. Pl. (11 Am. Ed.) 379; And. Steph. Pl. 343; Com. Dig. Plead. c. 39, 41; Tidd (9 Ed.), 443; *Taylor v. Eastwood*, 1 East 212.

⁷ 1 Chit. Pl. (11 Am. Ed.) 380; *Pinkney v. Inhab.*, 2 Saund. 379,

Upon the same principle, in trespass for a wrong relating to land, or other real property, a special or particular title in the plaintiff need not be shown in the declaration. The averment in describing the trespass, that the close or house, etc., in reference to which it was committed, was the close, etc., "of the plaintiff," or other equivalent allegation, is sufficient; and under it may be given in evidence any title or interest in *possession* which is adequate to the support of the form of action, under the circumstances of the case.¹

If no property or interest in the subject-matter of the suit is alleged to have existed or been vested in the plaintiff at the time the injury was committed, the declaration is substantially defective; the objection being the total omission, not the defective statement, of a title.² But the error in the declaration may be cured if the plea admits the plaintiff's property.³

3d. *Statement of the injury.*—In the declaration in trespass, which lies only for wrongs immediate, and committed with force, the injury is stated without any inducement of the defendant's motive or intent, or of the circumstances under which the injury was committed. The injury should be stated directly and positively, and not by way of recital; and therefore a declaration charging "for that whereas," or "wherefore," the defendant committed the trespass, is bad on special demurrer.⁴

In the statement of the trespasses, the words "with force and arms" (*vi et armis*) should be adopted; and the conclusion of the declaration should be "against the peace," etc. (*contra pacem, etc.*);⁵ but an omission in either respect is only cause of special demurrer, and is aided by verdict.⁶

n. 13; see *Kerr v. Sharp*, 14 Serg. & Rawle 99; *Carlisle v. Weston*, 1 Met. (Mass.), 26.

¹ 1 Chit. Pl. (11 Am. Ed.) 380; *Coryton v. Lithe*, 2 Saund. 113, a, n. 1; Com. Dig. Plead. 3, M. 9; *Hite v. Long*, 6 Rand. 457.

² *Pinkney v. Inhab.*, 2 Saund. 379, n. 13; Com. Dig. Plead. 3, M. 9.

³ 1 Chit. Pl. (11 Am. Ed.) 379; 1 Sid. 184.

⁴ *Horr v. Chapman*, 2 Salk. 637;

Collier v. Moulton, 7 Johns. 111; *Coffin v. Coffin*, 2 Mass. 364; *Syme v. Griffin*, 4 Hen. & Munf. 277; see *Marsteller v. McLean*, 7 Cranch 158.

⁵ 2 Chit. Pl. (11 Am. Ed.) 387, 388.

⁶ *Id.*; Stat. 4 & 5 Anne, c. 16, s. 1; Gross' Stat. 12, 13; see *Kerr v. Sharp*, 14 Serg. & Rawle, 403; *Higgins v. Hayward*, 5 Vt. 73; *Gardner v. Thomas*, 14 Johns. 134; *William v. Bogan*, 2 McC. (S. C.) 386; *Buntin v. Duchane*, 1 Blackf. 56.

It is usually sufficient to describe the tortious act or injury generally,¹ without setting out the particulars of the defendant's misconduct. And it will in general suffice that the tort is correctly laid in substance, though the statement is not literally true, provided there is no material misstatement. Thus, when the declaration charged that the defendant struck the plaintiff's cow, etc., whereof she died, it was held, after verdict, that there was no fatal variance, although the proof was that the plaintiff was obliged to kill the cow to shorten her misery, in consequence of the defendant's violence.²

In an action *ex delicto*, upon proof of part only of the injury charged, or of one of several injuries laid in the same count, the plaintiff will be entitled to recover *pro tanto*, provided the part of which is proved affords *per se* a sufficient cause of action; for torts are, generally speaking, divisible.³

The statement of the *time* of committing the injury is seldom material;⁴ and though a time ought to be alleged,⁵ the injury may be proved to have been committed either on a day anterior or subsequent to that laid in the declaration.⁶ And it seems an omission to allege a time would be aided even after a judgment by default.⁷

Where the injury was capable of being committed on several days, as in trespass to land, etc., it may be described as having been committed on such a day, "and on divers other days and times between that day and the commencement of this suit;" and in such case the first day should be laid anterior to the first injurious act, because the plaintiff would not be permitted to give in evidence repeated acts of trespass, unless committed during the space of time laid in his declaration; though he might recover as to a *single* trespass committed before the first day.⁸

¹ 1 Chit. Pl. (11 Am. Ed.) 391; see *Id.* 232.

² 1 Chit. Pl. (11 Am. Ed.) 391; *Hancock v. Southall*, 4 D. & R. 202.

³ 1 Chit. Pl. (11 Am. Ed.) 292; *Penton v. Robart*, 2 East 438; *Hite v. Blendford*, 45 Ill. 6.

⁴ 1 Chit. Pl. (11 Am. Ed.) 393.

⁵ 2 Harr. 1; 5 Taunt. 2; 5 Taunt. 15.

⁶ Co. Lit. 283 a; *Earle v. Vale*, 1 Saund. 24, n. 1; *White v. Stubbs*, 2 Saund. 295, n. 2.

⁷ *Higgins v. Highfield*, 13 East 407.

⁸ 1 Chit. Pl. (Am. Ed.), 393; 1 McC. 165; Stra. 1095; Salk. 639; 1 Stark. 351; Co. Lit. 283; see *McConnel v. Kibbe*, 33 Ill. 176; *Burnham v. Webster*, 5 Mass. 266.

Where a particular space of time is assigned by a *continuando* for the torts, it seems to become matter of description, and not a mere formal allegation of time; but the *continuando* may be waived, and one trespass even before the first day laid may be proved, for a *continuando* ought not to place the plaintiff in a worse situation than if one trespass only was laid.¹ But where the act complained of was single in its nature, as an assault, it would be demurrable to state that it was committed "on divers days and times."²

The *place* is only material in local actions, as for injuries to real property, etc.;³ and as a general rule, it is injudicious to give, when not necessary to do so, a particular local description, lest there should be a variance between the declaration and the proof.⁴

4th. *The damages*.—The general rule is well settled that the plaintiff can recover no greater damages than are laid in his declaration;⁵ they should therefore be laid sufficiently high to cover the largest amount that may be shown by the proof. Damages are either general or special. Those which necessarily result from the injury are termed general damages, being shown under the *ad damnum*, or general allegation of damages, at the end of the declaration; for the defendant must be presumed to be aware of the necessary consequences of his conduct, and therefore can not be taken by surprise in the proof of them. Some damages are always presumed to follow from the violation of any right or duty implied by law; and therefore the law will in such cases award nominal damages, if none greater are proved. But where the damages, though the natural consequences of the act complained of, are not the necessary result of it, they are termed *special damages*,

¹ Chit. Pl. (11 Am. Ed.), 394; see 2 Id. 847, n.; Gould's Pl. cap. 3, Sec. 83 *et seq.*

² *Id.*; *English v. Purser*, 6 East 395. But see *Burgess v. Freelove*, 2 B. & P. 425; Phillips' Ev. 134; also *Benson v. Swift*, 2 Mass. 50.

³ 1 Chit. Pl. (Am. Ed.), 394, 268; And. Steph. Pl. 330; see *Reed v. R. R. Co.*, 18 Ill. 403; see *R. R. Co. v.*

Wieczosek, 151 Ill. 579; *Sumner v. Finegan*, 15 Mass. 284; *Roach v. Damron*, 2 Humph. 425; *Graves v. McKoen*, 2 Denio 39.

⁴ 1 Chit. Pl. (11 Am. Ed.), 395; see *R. R. Co. v. Wieczosek*, 151 Ill. 579; *Meixsell v. Feezor*, 43 Ill. App. 180.

⁵ *Stephens v. Sweeney*, 2 Gilm. 375; *Fournier v. Faggott*, 3 Scam. 347.

which the law does not imply; and therefore, in order to prevent a surprise upon the defendant, they must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them on the trial.¹

Measure of damages.—Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less;² and this whether for an injury to his person or estate.³

In actions of trespass for taking personal property, the measure of damages is in general the value of the property when taken;⁴ and interest may be allowed from the time of the taking until the trial.⁵

Vindictive damages.—But wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the rule of exact compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.⁶

In actions for assaults, etc., evidence may be given of the pecuniary condition of the plaintiff and the defendant.⁷

¹ 2 Greenl. Ev., sec. 254; 1 Chit. Pl. (11 Am. Ed.), 395, 396; 4 Bing. 317; *Rindar v. Wadsworth*, 2 East 114; *Armstrong v. Percy*, 5 Wend. 538; *Dickenson v. Boyle*, 17 Pick. 78; *Baldwin v. R. R. Co.*, 4 Gray 333; *Olmstead v. Burke*, 25 Ill. 86; *Sherman v. Dutch*, 16 Ill. 283.

² Greenl. Ev., sec. 253; Co. Lit. 257, a; 2 Bla. Com. 438; *Rockwood v. Allen*, 7 Mass. 256; *Bussy v. Donaldson*, 4 Dall. 207; 3 Am. Jur. 257; see *Hessing v. McCloskey*, 37 Ill. 341; *Bridge Ass'n v. Loomis*, 20 Ill. 237.

³ *Bridge Ass'n v. Loomis*, 20 Ill. 237; see Sedgwick on Damages 39; *R. R. Co. v. Payzant*, 87 Ill. 125; *Dearlove v. Herrington*, 70 Ill. 251.

⁴ *Gilson v. Wood*, 20 Ill. 37; *Miller v. Kirby*, 74 Ill. 242.

⁵ *Bradley v. Geiselman*, 22 Ill. 494; *Hessing v. McCloskey*, 37 Ill. 341.

⁶ Sedgwick on Damages 39; *Grable v. Margrave*, 3 Scam. 373; *McNamara v. King*, 2 Gilm. 432; *Sherman v. Dutch*, 16 Ill. 283; *Bull v. Griswold*, 19 Ill. 631; *Bridge Ass'n v. Loomis*, 20 Ill. 237; *Foote v. Nichols*, 28 Ill. 486; *Best v. Allen*, 30 Ill. 30; *Stalling v. Owens*, 51 Ill. 92; *Drohn v. Brewer*, 77 Ill. 280.

⁷ *Cochran v. Ammon*, 16 Ill. 316; *McNamara v. King*, 2 Gilm. 432; *Grable v. Margrave*, 3 Scam. 372; *Mullen v. Spaungenberg*, 112 Ill. 140.

Joinder of counts.—In an action of trespass, the plaintiff may join counts for trespass to land, to the person, and to personal property; and each cause showing an independent cause of action, he may recover upon such counts as are sustained by proof, although he fails as to the others.¹

No. 177. For an assault, etc.—Alleging special damage.

In the ——— Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of ———. } sct. A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass: For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, assaulted the plaintiff, and then and there violently seized and laid hold of him, and pulled and tore large quantities of hair from and off the head of the plaintiff, and then and there, with a certain stick and with his fists, gave and struck the plaintiff a great many violent blows and strokes on divers parts of his body; and also then and there, with great force and violence, shook and pulled about the plaintiff, and threw him down to and upon the ground, and violently kicked the plaintiff, and gave and struck him a great many other blows and strokes; and also then and there, with great force and violence, tore and damaged the clothes, to wit, one coat, one waistcoat, one pair of trousers, one shirt and one hat, of the plaintiff, of the value of ——— dollars, which he then and there wore: By means of which several premises the plaintiff was then and there greatly hurt, bruised and wounded, and became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, *hitherto*; during all which time the plaintiff thereby suffered great pain, and was hindered and prevented from performing and transacting his affairs and business by him during that time to be performed and transacted; and also thereby the plaintiff was obliged to and did necessarily lay out divers sums of money, amounting to ——— dollars, in and about endeavoring to be healed of the said bruises, wounds, sickness, soreness, lameness and disorder so by the defendant occasioned as aforesaid.

(*Second count, for another assault, etc.*) And also for that the defendant on, etc., with force and arms, etc., in the county aforesaid, again assaulted the plaintiff, and then and there *again (here set forth the injuries, and the consequent damage, according to the facts, in like manner as in the first count)*.

(*Conclusion.*) And other wrongs the defendant to the plaintiff then and there did, to the great damage of the plaintiff, and against the peace of the people of this state. Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of ——— dollars, and therefore he brings his suit, etc.

¹ Chit. Pl. (11 Am. Ed.) 201; *Reed Baker*, 19 Pick. 517; *Arnold v. R. R. Co.*, 18 Ill. 403; *Bishop v. Maudlin*, 6 Blackf. 187.

It is best to allege only such acts of trespass as can be proved; an over-statement, unsupported by evidence, is detrimental, and affords ground for ridicule on the part of the defendant's counsel. The allegations should conform as nearly as may be to the facts of each particular case.

If there have been several assaults, at different times, for which the plaintiff intends to proceed, there should be a distinct count for each assault; but otherwise it is not necessary, though usual, to insert a count (like the next form) for a common assault, for if the plaintiff proves any part of a special count he will be entitled to a verdict *pro tanto*, though he fails to prove the residue.¹

Under the allegation of "other wrongs" (*alia enormia*), damages and matters which naturally arise from the act complained of, or can not with decency be stated, may be given in evidence in aggravation of damages, though not specified in any other part of the declaration. Thus in trespass for breaking and entering a house, the plaintiff may, in aggravation of damages, give in evidence the debauching of his daughter or the battery of his servants, under the general allegation of *alia enormia*,² and yet this matter may be alleged specially; but he can not under that general allegation give in evidence the loss of service, or any other matter which would of itself bear an action. Therefore in trespass *quare clausum fregit*, the plaintiff would not, under the allegation of *alia enormia*, be permitted to give evidence of the defendant's taking away a horse, etc.; and in the other cases, the evidence is allowed to be given, not as a substantive ground of action, but merely to show the violence of the defendant's conduct, and give a character to the case.³

No. 178. *For a common assault.*

(Commence as in last precedent.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, made an assault on the plaintiff, and then and there beat, *bruised, wounded* and ill-treated him; and other wrongs to the plaintiff then and there did; against the peace of

¹ 2 Chit. Pl. 851, n.

³ 1 Chit. Pl. (11 Am. Ed.), 397;

² 1 Chit. Pl. (11 Am. Ed.), 397; but see *Tinsley v. Rowe*, 17 Bradw. 326. see Peake Ev. 87 (3 Ed.); 2 Phil. Ev. 134.

the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 179. — For an assault with a pistol, and wounding, etc.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, made an assault upon the plaintiff, and shot off a certain pistol, then and there loaded with gunpowder and leaden bullets, at and against the plaintiff, and thereby then and there shot and wounded the plaintiff in so grievous a manner that his life was despaired of; and by reason of such shooting and wounding the plaintiff then and there became lame, sick and disordered, and so continued for a long time, to wit, from thence *hitherto*, and was during all that time thereby rendered incapable of following and transacting his affairs and business by him during that time to be done; and also thereby the plaintiff was obliged to and did necessarily lay out divers sums of money, amounting to — dollars, in and about endeavoring to be cured of the wounds, sickness, lameness and disorder aforesaid, occasioned as aforesaid; and other wrongs the defendant to the plaintiff then and there did, against the peace of the people of this state and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

A count for a common assault may be inserted, if deemed expedient, concluding the declaration as in No. 177, *ante*.

No. 180. For riding or driving against the plaintiff.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, assaulted the plaintiff, and with great force and violence rode (*drove*) a certain horse (*drawing a certain carriage*) against, upon and over the plaintiff, and then and there, with the said horse (*and carriage*), violently knocked and threw the plaintiff down to and upon the ground there, and grievously hurt, bruised and wounded him (*any particular serious injury may be here alleged*), and tore and damaged the clothes, to wit, one coat, one waistcoat, one pair of trousers, one shirt and one hat of the plaintiff, of the value of — dollars, which he then and there wore, and by reason of such hurting, wounding and bruising, the plaintiff then and there became (*proceed in like manner as in the last precedent to the end. See No. 177, ante*).

No. 181. By husband and wife against husband and wife, for a battery of one wife by the other. [2 Chit. Pl. 854.]

(Title of court, etc.) A. B. and C. D., his wife, complain of E. F. and G. H., his wife, of a plea of trespass; for that the said G. H., on, etc., with force and arms, etc., assaulted the said C. D., then and still being the wife of the said A. B., to wit, at, etc., and then and there beat, bruised, wounded and ill-treated her, so that her life was then and there greatly despaired of; and other wrongs to the said C. D. then and there did; against the peace, etc., and to the damage of the said A. B. and C. D., his wife, of — dollars, and therefore they bring their suit, etc.

The acts of trespass are to be described according to the facts. Care must be taken to declare only for the personal injury and suffering of the wife, and not to include any allegation of an injury which, in point of law, only affected the husband, and not the wife. In Illinois, the husband need not join as plaintiff in an action for a personal injury to the wife.¹

No. 182. Common count for a false imprisonment.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, made an assault upon the plaintiff, and beat, bruised and ill-treated him, and then and there imprisoned him, and detained him in prison there, without any reasonable or probable cause whatsoever, for the space of — hours then next following, contrary to the laws of this state, and against the will of the plaintiff; and other wrongs to the plaintiff then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 183. For an assault etc., and false imprisonment.

(Commence as in No. 177, ante.) For that the defendant, on etc., with force and arms, etc., in the county aforesaid, assaulted the plaintiff, and seized and laid hold of him, and with great violence pulled and dragged him about, and gave and struck the plaintiff a great many violent blows and strokes; and also then and there forced the plaintiff to go from out of a certain dwelling-house, in the city of —, in the county aforesaid, into the public street there and compelled him to go in and along divers public streets, to a certain police office in the said city; and also then and there imprisoned the plaintiff, and detained him in prison there, without any reasonable or probable cause whatsoever, for the space of — — then next following, contrary to the laws of this state, and against the will of the plaintiff; whereby the plaintiff was then and there not only greatly hurt, bruised and wounded, but was exposed to public disgrace, and injured in his credit and circumstances; and other wrongs the defendant to him, the plaintiff, then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit.²

If deemed expedient, the common count for a false imprisonment, and a count for a common assault, may be inserted, concluding the declaration as in No. 177, *ante*.

¹ Rev. Stat. (1893), 806; Rev. Stat. (1895), 855; 1 Starr & Curtis 1269; *R. R. Co. v. Dunn*, 52 Ill. 260; *Chestnut v. Chestnut*, 77 Ill. 346; *Chicago v. McGraw*, 75 Ill. 566.

² See *Slomer v. People*, 25 Ill. 70; *Outlaw v. Davis*, 27 Ill. 467; *Donnelly v. Harris*, 41 Ill. 126; *Roth v. Smith*, 54 Ill. 431.

In order to sustain an action for a false imprisonment, it is not necessary for the plaintiff to show that the defendant used violence, or laid hands on him, or shut him up in any jail or prison, but it is sufficient to show that the defendant in any manner unlawfully restrained the plaintiff of his liberty, or detained him from going where he wished.¹

One who has counseled, advised or procured the false imprisonment of another, is liable as a principal, although he did not participate actively in the commission of the act.²

No. 184. For debauching the plaintiff's daughter and servant.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, assaulted, debauched and carnally knew one E. B., then and from thence hitherto being the daughter and servant of the plaintiff; whereby the said E. B. became pregnant and sick with child (*proceed as in the form in case No. 341, post, and conclude*). And other wrongs the defendant to the plaintiff then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

See the form No. 341, *post*, and the observations thereunder.

The first count may be for trespass in entering the plaintiff's dwelling-house, and there debauching his daughter, with a second count as above.³

No. 185. For criminal conversation.

(Commence as in No. 177, ante.) For that the defendant, on, etc., and on divers other days between that day and the day of commencing this suit, with force and arms, etc., in the county aforesaid, assaulted and ill-treated E. B., then and still being the wife of the plaintiff, and then and there debauched and carnally knew her; whereby the plaintiff, from the day first aforesaid hitherto, has lost and been deprived of the comfort, fellowship and aid of his said wife, which he ought to have had, and otherwise might and would have had, in his domestic affairs; and other wrongs the defendant to the plaintiff then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings this suit, etc.

See the form No. 340, *post*, and the observations thereunder.

¹ *Hawk v. Ridgway*, 33 Ill. 473;
see *Newton v. Locklin*, 77 Ill. 103;
see Bac. Abr., Tres., D, 3; 2 Bouv.
Inst. 589; 1 Chit. Prac. 47, 48.

² *Roth v. Smith*, 41 Ill. 314.

³ 2 Chit. Pl. 856, n.

No. 186. For taking goods—Common count de bonis asportatis.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, seized, took and carried (or “drove,” or “led”) away the goods and chattels, to wit, (*here describe the property.*) of the plaintiff, of the value of — dollars, and converted and disposed of the same to his own use; and other wrongs to the plaintiff then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

As to the description of the property, and the allegation of the value, and of the plaintiff's right of interest, see the observations under the head of “The Declaration,” *ante*.

Where the declaration states a case of trespass *de bonis asportatis*, the wrongful seizure of goods and chattels described, is the gist of the action, the conversion of the goods alleged being mere matter of aggravation.¹

No. 187. For chasing cattle—Alleging special damage.

(Commence as in No. 177, ante.) For that the defendant, on, etc., and on divers other days between that day and the commencement of this suit, with force and arms, etc., drove, chased and hurried the cows, oxen and calves, to wit, — cows, — oxen, and — calves, of the plaintiff, of the value of — dollars, then depasturing and being in and upon a certain waste or common in the county aforesaid, and then and there chased and drove the said cows, oxen and calves from and off the said common, to divers places to the plaintiff unknown; whereby the plaintiff was not only put to great trouble, and to great expense, amounting in the whole to the sum of — dollars, in and about endeavoring to find his said cows, oxen and calves, but also divers thereof, to wit, — cows, — oxen and — calves, of the value of — dollars, then and there died; and others thereof to wit, — cows, — oxen and — calves, of the value of — dollars, then and there became and were wholly lost to the plaintiff; and the residue of the said cows, oxen and calves then and there became and were greatly damaged and lessened in value; and other wrongs the defendant to the plaintiff then and there did, against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.²

No. 188. For chasing a mare, whereby she dropped a dead foal.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, drove and chased a certain mare of the plaintiff, of the value of — dollars, whereby the said mare

¹ *McGillis v. Bishop*, 27 Ill. App. 53; *Taylor v. Cole*, 3 Term 155; *Gelston v. Hoyt*, 3 Wheat. 326.

² Chit. Pl. 858.

then and there slipped and dropped a dead foal; by means whereof the said mare was then and there greatly hurt and damaged, and the plaintiff was deprived of the use of the said mare for the space of — weeks then next following; and the defendant other wrongs to the plaintiff then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc,

No. 189. For driving a carriage against the plaintiff's, whereby he was thrown out and his carriage damaged.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., in the county aforesaid, drove a certain carriage with great force and violence against a certain carriage of the plaintiff, of the value of — dollars, in which last mentioned carriage the plaintiff was then and there riding in and along the highway there, and thereby then and there greatly broke, damaged and spoiled the said carriage of the plaintiff; and by means of the premises the plaintiff was then and there thrown with great violence out of his said carriage to and upon the ground; and also by means of the premises the plaintiff was thereupon obliged to expend, and did expend, the sum of — dollars, in repairing his said carriage; and also by means of the premises the plaintiff was then and there greatly bruised, hurt, wounded and disordered, and so continued for the space of — days then next following, and during all that time was prevented from transacting his business by him during the said time to be transacted, and was also thereby obliged to expend, and did expend, divers sums of money, amounting to — dollars, in the cure of his said bruises, hurts, wounds and disorder, occasioned as aforesaid; and the defendant other wrongs to the plaintiff then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefor he brings his suit, etc.

By statute in Illinois, the owner “of any carriage running upon any turnpike road or public highway, for the conveyance of passengers,” is liable, in an action of trespass, for any injury or damage occasioned by the willful act of the driver.¹

No. 190. For killing plaintiff's horse.

(Commence as in No. 177, ante.) For that the defendant on, etc., with force and arms, etc., in the county aforesaid, beat, bruised, wounded and ill treated a certain gelding of the plaintiff, of the value of — dollars, so that the said gelding languished of the said bruises and wounds then and there given, for the space of — days then next following, during which time the plaintiff was thereby obliged to and did lay out divers sums of money, amounting to — dollars, in endeavoring to cure the said gelding;

¹ Rev. Stat. (1893) 1255; Rev. Stat. 277; see *Johnson v. Barber*, 5 Gilm. (1895) 1345; 2 Starr & Curtis' An 425.
Stat. 2175; *Tuller v. Voght*, 13 Ill.

and afterward, to wit, on, etc., by reason of the said bruises and wounds, the said gelding there died; and other wrongs the defendant to the plaintiff then and there did; against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 191. Declaration for shooting plaintiff's dog.

In the — — Court.

— Term, A. D. 18—,

STATE OF ILLINOIS, }
County of —. } ss.

A. B., the plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass; for that the defendant on, etc., at, etc., with force and arms, etc., shot off and discharged a certain gun, then and there loaded with gunpowder, and shot at and against a certain dog of the plaintiff, of great value, to wit, of the value of — dollars, and thereby and therewith then and there so greatly shot, hurt and wounded the said dog, that by reason thereof the said dog being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died, to wit, at, etc., aforesaid; and other wrongs to the plaintiff then and there did, against the peace of the people of this state, and to the damage of the plaintiff of — dollars; and therefore he brings suit, etc.

By E. F., Att'y for Plff.

No. 192. Against a constable, on the statute,¹ for double value, for taking exempted property in execution.

(Commence as in No. 177, ante.) For that before and at the time of the issuing of the writ hereinafter mentioned, and from thence until and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff was the head of a family, and residing with the same, and at the time last mentioned was the owner of two horses, worth not exceeding two hundred and fifty dollars, that is to say, of the value of — dollars, and was not the owner of any other horses, or of any oxen, to wit, in the county aforesaid; by reason whereof, and by force of the statute in such case made and provided, the said horses of the plaintiff were then and there exempt from execution; and on, etc., the defendant, then being one of the constables in and for the county aforesaid, not regarding the said statute, with force and arms, etc., there took and seized the said horses of the plaintiff, by virtue of a certain writ of execution before that time, to wit, on, etc., sued forth against the goods and chattels of the plaintiff by one J. K. before one L. M., then one of the justices of the peace in and for the county aforesaid; which said writ was not issued in any action to recover the purchase-money for the said horses: Against the peace of the people of this state, and to the great damage of the plaintiff, and against the form of the statute aforesaid.²

¹ Rev. Stat. (1893), 727; Rev. Stat. (1895), 775; 1 Starr & Curtis 1114; see *Figuera v. Pyatt*, 88 Ill. 402,

² See *Cook v. Scott*, 1 Gilm. 333; *Pace v. Vaughn*, 1 Gilm. 30; *Hecker v. Grewe*, 125 Ill. 53.

(*Second count at common law, for taking chattels.*) And also for that the defendant, on, etc., with force and arms, etc., in the county aforesaid, seized, took, drove and led away other the goods and chattels, to wit, two other horses, of the plaintiff, of the value of — dollars, and converted and disposed of the same to his own use; and other wrongs to the plaintiff then and there did; to the great damage of the plaintiff, and against the peace of the people of this state.

(*Conclusion.*) Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of — dollars, and therefore he brings his suit, etc.

If the plaintiff declares in the common form of a declaration in trespass, without any reference to the statute, he can only recover simple damages for the trespass. If he desires to claim the penalty, he should declare specially on the statute.¹

No. 193. For trespass in dwelling-house, breaking open doors, and seizing goods therein.

(*Commence as in No. 177, ante.*) For that the defendant, on, etc., with force and arms, etc., broke and entered a certain dwelling-house of the plaintiff, situate in the county aforesaid, and made a great noise and disturbance in the said dwelling-house, and stayed and continued therein, making such noise and disturbance, for the space of — days then next following, and then and there forced and broke open, broke to pieces and damaged — doors of the plaintiff, belonging to the said dwelling-house, with the appurtenances, and broke to pieces, damaged and spoiled — locks, — staples and — hinges, of and belonging to the said doors respectively, and wherewith the same were then fastened, of the value of — dollars; and also, during the time aforesaid, to wit, on, etc., with force and arms, etc., seized and took divers goods and chattels, to wit (*describe the goods*), of the plaintiff, then found and being in the said dwelling-house, and being of the value of — dollars, and carried away the same, and converted and disposed thereof to his own use, to wit, in the county aforesaid; by means of which several premises the plaintiff and his family were, during all the time aforesaid, not only greatly annoyed and disturbed in the peaceable possession of his said dwelling-house, but also the plaintiff was during all that time hindered and prevented from carrying on and transacting therein his necessary affairs and business. (*A count may be added for an expulsion, as below, if applicable to the facts, and also a count de bonis asportatis, for which see No. 186, ante—concluding the declaration as in No. 177, ante.*)

The above declaration in substance charges the defendant

¹ *Pace v. Vaughn*, 1 Gilm. 30; see *Chipman v. Emeric*, 5 Cal. 239.

with breaking open an outer door, and if he pleads a justification, it must be framed accordingly.¹

No. 194. Count for a common expulsion.

And also for that the defendant, on, etc., with force and arms, etc., broke and entered a certain other dwelling house of the plaintiff, situate in the county aforesaid, and then and there expelled and amoved the plaintiff and his family from the possession, use, occupation and enjoyment of the last mentioned dwelling-house, and kept and continued them so expelled and amoved for a long space of time, to wit, from thence hitherto; whereby the plaintiff, during all that time, lost and was deprived of the use and benefit of his last mentioned dwelling-house.

No. 195. For trespass to land—Entering close, breaking open gates, destroying crops, etc.

(Commence as in No. 177, ante.) For that the defendant on, etc., and on divers other days between that day and the commencement of this suit, with force and arms, etc., broke and entered a certain close of the plaintiff, situate in the county aforesaid, and then and there forced and broke open, broke to pieces, damaged and spoiled — gates of the plaintiff, of the value of — dollars, then standing and being in the said close, and — locks, — staples and — hinges of the plaintiff, of the value of — dollars, respectively affixed to the said gates, and with which the same were then respectively locked and fastened; and with feet in walking trod down and spoiled the grass and corn of the plaintiff, of the value of — dollars, then and there growing and being; and with horses, cows, oxen and sheep, depastured and consumed the grass and corn of the plaintiff, of the value of — dollars, then growing and being in the said close; and with divers other horses, cows, oxen and sheep, and also with the wheels of divers carts, wagons and other carriages, crushed, damaged and spoiled other the grass and corn of the plaintiff, of the value of — dollars, then and there also growing and being; and with the feet of the said horses, and with the wheels of the said carts, wagons and other carriages, tore up, damaged and spoiled the earth and soil of the said close; and also then and there mowed and cut down the grass and corn of the plaintiff, then growing in the said close, and seized, took and carried away — wagon-loads of hay and — wagon-loads of corn of the plaintiff, of the value of — dollars off and from the said close, and converted and disposed of the same to his own use, and also then and there cut down and destroyed — oaks, — ash trees, — elms, etc., (*according to the fact,*) and — other trees, and — acres of underwood, of the plaintiff, of the value of — dollars; and the timber, wood, branches and bushes thereof coming and arising, to-wit, — wagon-loads of timber, — wagon-loads of wood, — wagon-loads of branches and — wagon-loads of bushes, of the plaintiff, of the value of — dollars, took and carried away, and converted and disposed of the

¹ 2 Chit. Pl. 864, n.; *Buckenham v. Francis*, 11 Moore, 40.

same to his own use; and also then and there placed and erected, and caused to be placed and erected, divers sheds and stables in and upon the said close, and kept and continued the said sheds and stables, so there placed and erected, without the leave or license, and against the will of the plaintiff, from, etc., hitherto; and thereby and therewith, during all the time aforesaid, greatly incumbered the said close, and hindered and prevented the plaintiff from having the use, benefit and enjoyment thereof in so large and ample a manner as he might and otherwise would have done. (See note at end of No. 193, ante.)

A declaration in trespass *quare clausum fregit* must set forth a trespass committed to real property in the county where the action is brought. It is sufficient to describe the close or house generally, as in the above precedents;¹ but if the description is general, and the defendant pleads *liberum tenementum*, the plaintiff must make a new assignment; and to avoid this necessity it may sometimes be advisable to give a precise description of the property in the declaration. When this is done, care should be taken to avoid any mistake in the description.²

While the action of trespass *quare clausum fregit* does not necessarily involve the title or seizin, yet the gist of the action is the injury to the possession. Hence, the judgment in such action will ordinarily be conclusive upon the right of possession.³

No. 196. For cutting down and carrying away trees, etc.

(Commence as in No. 177, ante.) For that the defendant, on, etc., and on divers other days and times between that day and the commencement of this suit, with force and arms, etc., in the county aforesaid, felled, cut and destroyed the trees and saplings, to wit, — oaks, — ash trees, — elms, — other trees, and — saplings, of the plaintiff, of the value of — dollars, then growing and being in and upon certain lands there situate, and took and carried away the said trees and saplings, and converted and disposed of the same to his own use; and other wrongs to the plaintiff then and there did, against the peace of the people of this state, and to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

A count may be inserted for carrying away trees generally. The above count—not alleging any trespass on the close—is

¹ 2 Chit. Pl. 863, n.

² *Ibid.*; *Elson v. Comstock*, 150 Ill.

³ Ol. Prec. 564; 2 Chit. Pl. 868; see 303.

Meixsell v. Feezor, 43 Ill. App. 180.

proper where the land has been demised, and the trees were excepted in the lease.

Possession of a farm draws with it possession of the adjoining woodland, though uninclosed.¹

No. 197. For digging in a coal mine, and carrying away coal therefrom.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., broke and entered a certain coal mine or vein of coal of the plaintiff, situate, etc., and dug out of the said coal mine or vein of coal divers large quantities of coal, to wit, — tons of coal, of the plaintiff, of the value of — dollars, and took and carried away the same, and converted and disposed of the same to his own use. (*Conclude as in the last precedent; or a count de bonis asportatis may be added, with conclusion as in No. 177, ante.*)

No. 198. For digging mines, raising ore, and taking and converting it.

(Commence as in No. 177, ante.) For that the defendant, on, etc., with force and arms, etc., broke and entered the close of the plaintiff, in the county aforesaid, and then and there, with shovels, pick-axes and other instruments, dug up, turned and subverted the earth and soil, to wit, — acres of earth and soil, of the said close of the plaintiff; and then and there dug, made and sank divers mines, pits, shafts and holes, to wit, — mines, — pits, — shafts and — holes, of great breadth and depth, to wit, each of the breadth of — feet, and of the depth of — feet in the said close of the plaintiff there; and from and out of the said mines, pits, shafts and holes, then and there raised, dug and got divers large quantities of earth, soil, stones, lead ore, copper ore, and other ore of the plaintiff, to wit, etc., of the value of — dollars; and the same so raised, dug and got, did then and there seize, take, carry away and convert to his own use. (*See note at end of last precedent.*)

DEFENSES TO THE ACTION.

For pleas in abatement, and observations thereon, etc., see Defenses to an Action, *ante*.

Pleas in bar.—In trespass, the general issue is “not guilty.” On this issue the plaintiff must prove, 1st, that the property was actually or constructively in his possession at the time of the injury, and this rightfully, as against the defendant; and 2d, that the injury was committed by the defendant with force;² and the defendant may give in evidence any matter tending

¹ *Penn v. Preston*, 2 Rawle 14; ² 2 Greenl. Ev., Sec. 613.
Buck v. Aiken, 1 Wend. 466.

to disprove either of these propositions.¹ Every defense which admits the defendant to have been *prima facie* a trespasser, must be specially pleaded; but any matters which go to show that he never did the acts complained of, may be given in evidence under the general issue. Thus, for example, under this issue it may be proved that the plaintiff has no property in the goods; or that the defendant did not take them; or that he did not enter the plaintiff's close.² But if he acted by license, even from the plaintiff, without claiming title in himself;³ or if he would justify under a custom to enter;⁴ or under a right of way;⁵ or if the injury was occasioned by the plaintiff's own negligence, or was done by the defendant from any other cause, short of such extraneous force as deprived him of all agency in the act, it can not be shown under this issue, but must be specially pleaded.⁶

All matters in discharge or justification must be specially pleaded.⁷ Thus a former recovery,⁸ accord and satisfaction,⁹ the statute of limitations,¹⁰ or a license,¹¹ must be specially pleaded. So an officer wishing to justify under legal process must plead it specially.¹² But where, in trespass for taking goods, the defense is that the goods were seized by the defend-

¹ 2 Greenl. Ev., Sec. 625; 1 Chit. Pl. (11 Am. Ed.), 500.

² 2 Greenl. Ev., Sec. 625; 1 Chit. Pl. (11 Am. Ed.), 500, 501; 2 Hill on Torts, 81.

³ 2 Camp. 378; 1 Peake 67; *Ruggles v. Lesure*, 24 Pick. 187; *Hill v. Morey*, 26 Vt. 178; 2 Hill on Torts 81-83.

⁴ *Waters v. Lilly*, 4 Pick. 145.

⁵ But see *Strout v. Berry*, 7 Mass. 385.

⁶ 2 Greenl. Ev., Sec. 625; 1 Chit. Pl. (11 Am. Ed.), 501; 2 Camp. 500; *Pettengill v. Lawrence*, 20 Ill. App. 553.

⁷ And. Steph. Pl. 235; *Hahn v. Ritter*, 12 Ill. 80; *Briggs v. Mason*, 31 Vt. 433; *Jewett v. Goodale*, 19 N. H. 562; *Beatty v. Swarthout*, 32 Barb. 293; *Comstock v. Oberman*, 18 Bradw. 326;

Olson v. Upsahl, 69 Ill. 273; *Blanchard v. Burbank*, 16 Bradw. 375.

⁸ 1 Chit. Pl. (11 Am. Ed.) 506, 507; *Hahn v. Ritter*, 12 Ill. 80; *Davis v. Scott*, 1 Blackf. 169; *Coles v. Carter*, 6 Cow. 691.

⁹ 1 Chit. Pl. (11 Am. Ed.), 506; see *Ross v. Nesbitt*, 2 Gilm. 252.

¹⁰ 1 Chit. Pl. (11 Am. Ed.), 506; see *Gebhart v. Adams*, 23 Ill. 397.

¹¹ 1 Chit. Pl. (11 Am. Ed.), 491, 502, 505; 7 Blackf. 373; 2 Taunt. 156; *Ruggles v. Lesure*, 24 Pick. 187; see *Blake v. Dow*, 18 Ill. 261.

¹² 1 Chit. Pl. (11 Am. Ed.), 501, 506, 534; see *Barnes v. Barber*, 1 Gilm. 401; *Cook v. Miller*, 11 Ill. 610; *McDonald v. Wilkie*, 13 Ill. 22; *Tefft v. Ashbaugh*, 13 Ill. 602; *Clark v. Lewis*, 35 Ill. 417; *Bowman v. St. John*, 43 Ill. 337.

ant as an officer, by virtue of legal process against a *third person*, and that the goods belonged to such third person, it seems to be unnecessary to plead such defense specially,¹ as it amounts only to a denial of the plaintiff's right.

Matters in mitigation of the wrong and damages may be given in evidence under the general issue.² And it seems that a variance in the description of the *locus in quo* is available to the defendant under this issue, as the allegation of place, in trespass *quare clausum fregit*, is essentially descriptive of the particular trespass complained of.³ But the variance, to be available, must be in some essential part of the description.⁴

The plea of "not guilty," in an action of trespass for taking goods, operates only as a denial of the taking; and the trial of an issue on such plea determines nothing as to the right of property.⁵ The general issue, in actions for torts, is regarded as several, though it may be in form joint;⁶ and one defendant, against whom there is no evidence, may be acquitted, and a verdict taken against the others; but it is otherwise as to a joint plea of justification, under which, if it is not supported as to all the defendants, none of them can be protected.⁷

No. 199. Plea—Not guilty.

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } *Trespass.*

A. B. } And the defendant, by E. F., his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against him: And of this the defendant puts himself upon the country, etc.

¹ *Jackson v. Hobson*, 4 Scam. 411.

² 2 Greenl. Ev., § 625; 3 Hurl. and Nor. 276; *Briggs v. Mason*, 31 Vt. 433; *Collins v. Perkins*, 31 Vt. 624; see 6 Adol. & El. 174, N. S.

³ 2 Greenl. Ev., § 625; 3 Stephen's N. P. 2642; 10 Law Jour. 203; 1 Salk. 452; 1 Moore, 161; 8 Taunt. 539.

⁴ *Id.*; 1 Taunt. 495; see *Doe v. Salter*

13 East 9; *Walford v. Anthony*, 8 Bing. 75; *Lethbridge v. Winter*, 2 Bing. 49.

⁵ *Harris v. Miner*, 28 Ill. 135.

⁶ *Downer v. Flint*, 28 Vt. (2 Wms.) 527; 2 Hill on Torts, 317.

⁷ 2 Hill on Torts, 317; *Drake v. Barryman*, 14 Johns. 166; *Gleason v. Edmunds*, 2 Scam. 448.

No. 200. *Plea of son assault demesne.*

(*First plea, not guilty, as ante, last precedent.*) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, (*) that the plaintiff just before the said time when, etc., to wit, on the same day in the said declaration mentioned, with force and arms, etc., in the county aforesaid, made an assault upon the defendant, and would then and there have beaten, bruised and ill-treated him, if he had not immediately defended himself against the plaintiff; wherefore the defendant did then and there defend himself against the plaintiff, as he lawfully might for the cause aforesaid, and in so doing did commit the supposed trespasses in the said declaration mentioned: And so the defendant says, that if any hurt or damage then and there happened to the plaintiff, the same was occasioned by the said assault so made by the plaintiff upon him, the defendant, and in his necessary defense of himself against the plaintiff. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.

If some particular trespasses only, of several charged in a declaration or count, are intended to be justified, such particular trespasses should be enumerated, in the manner indicated in the plea next following.¹

In a plea of *son assault demesne*, a *wounding* may be justified in self-defense, in the above form; but where the law *prima facie* only authorizes an arrest, or touching a person, if a wounding also is attempted to be justified, the occasion thereof must be specially alleged—as in the case of an arrest under process, a resistance, or attempt to rescue must be averred.² In defense of the person, an assault and battery, etc., may be justified;³ but in defense of the possession of personal or real property, the defendant must plead *molliter manus imposuit*.⁴ It seems clear that the defendant can not in any case justify an actual *beating* and *wounding*, unless he shows in his plea that force was used or attempted on the part of the plaintiff; but still he may justify what in law amounts to a *battery*, by way of *molliter manus imposuit*.⁵

¹ See remarks, *ante*, 57.

² *Greene v. Jones*, 1 Saund. 296. 297; *Id.*, n. 1; *Weaver v. Bush*, 8 T. R. 78; *Gregory v. Hill*, 8 T. R. 299.

³ *Cockcraft v. Smith*, 2 Salk. 649; *Cockcraft v. Smith*, 1 Ld. Raym. 177;

Bul. N. P. (7 Ed.) 18; *Dale v. Wood*, 7 Moore 33.

⁴ 1 Salk. 407; *Weaver v. Bush*, 8 T. R. 78; Com. Dig. Plead., 3 M. 15; *Mellen v. Thompson*, 32 Vt. 407.

⁵ *Smith v. Edge*, 6 T. R. 562; *John-*

The following is a somewhat different form of the plea of *son assault demesne*.¹

No. 201. *Plea of son assault demesne—Defense of child, etc.*

(*First plea, not guilty, as ante, No. 199.*) And for a further plea in this behalf, as to the assaulting, beating, bruising, wounding and ill-treating of the plaintiff, and as to the tearing, spoiling and damaging of the clothes of the plaintiff, (*etc., enumerating the trespasses charged, or, if it is only intended to justify a part, then such part*), as in the said declaration (*or "first count"*) mentioned, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that the plaintiff, just before the said time when, *etc.*, to wit, on the same day in the said declaration (*or "first count"*) mentioned, with force and arms, *etc.*, in the county aforesaid, made an assault upon L. B., then and there being the *daughter* of the defendant, and would then and there have beaten, bruised and ill-treated *her*, the said L. B., if the defendant had not immediately defended *her*, wherefore the defendant did then and there defend the said L. B., so being his *daughter* as aforesaid, against the plaintiff, as he lawfully might for the cause aforesaid, and in so doing did *necessarily and unavoidably* a little beat, bruise, (*etc., as in the introductory part of the plea,*) *doing no unnecessary damage to the plaintiff on that occasion*; and so the defendant says, that if any hurt or damage then and there happened to the plaintiff, the same was occasioned by the said assault so made by the plaintiff upon the said L. B., and in the necessary defense of *her*, the said L. B., against the plaintiff; which are the same supposed trespasses in the introductory part of this plea mentioned, *etc.* And this the defendant is ready to verify; wherefore he prays judgment, *etc.*

See the form next preceding this, and the remarks thereunder. This form may be readily adapted to the case of an assault in defense of a father, mother, son, servant, or master.

No. 202. *General replication, de injuria, etc.*

(*Similiter to general issue, if pleaded as ante, No. 10; if not, entitle first replication as in that form.*) And the plaintiff, as to the plea of the defendant by him *secondly* above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, (*) because he says, that the defendant, at the said time when, *etc.*, of his own wrong, and without the cause by him in his said *second* plea alleged, committed the said several trespasses in that plea mentioned, in manner and form as the plaintiff has above complained

son v. Northwood, 7 Taunt. 689; 3 Chit. Pl. 1068, n.

¹ See 3 Chit. Pl. 1068-1070, and notes.

against the defendant: And this the plaintiff prays may be inquired of by the country, etc.¹

The above form will suffice in all cases in trespass where this replication is proper, though where replied to the plea of *son assault demesne*, a form slightly different is used.² The general replication, *de injuria sua, absque tali causa*, is adapted to the denial of matter of excuse or justification; and where the excuse or justification consists exclusively of mere matter of *fact*, as distinguished from matter of *record, title, authority*, etc., (which involves matter of *law*), this replication is the most appropriate mode of traversing it. When the justification involves matter of law, (as where, in an action for assault, battery and false imprisonment, the defendant justifies under a *capias* directed to him as sheriff,) this general traverse would be ill;³ but the plaintiff, in a case like this, may traverse *separately* any one material point in the plea, which point may consist either of the record, etc., or of the matter of mere fact pleaded in connection with it. For example, he may traverse the *capias*, by replying *nul tiel record*; or he may admit the *capias*, and traverse the matter of mere fact, by alleging that the defendant "of his own wrong, and without the *residue* of the cause in the said plea alleged," made the assault, etc. And when matter of record, title, etc., is alleged, not as *the ground* of the justification, but only as inducement, the general replication, *de injuria, etc.*, is good.⁴

When in fact the plaintiff made the first assault, in defense of his possession, etc., or whenever, in answer to the defendant's plea of *son assault demesne*, he relies upon new matter, he should not apply generally, *de injuria, etc.*, but should allege such new matter,⁵ otherwise he can not justify the prior assault.⁶ But it is now held, that if *son assault demesne* is pleaded, the plaintiff may under this general replication, show that the defendant's battery of him was excessive, without

¹ See 1 Chit. Pl. (11 Am. Ed.), 604-611; 3 *Id.* 1202; 2 Swan's Pr. 770, n. Gould's Pl., cap. 7, §§ 26-50.

² 3 Chit. Pl. 1202.

³ And. Steph. Pl. 242.

⁴ Gould's Pl., cap. 7, §§ 26-30.

⁵ 1 Chit. Pl. (11 Am. Ed.), 592; 3 *Id.* 1203, n.; *Ayres v. Kelley*, 11 Ill. 17; *Fortune v. Jones*, 30 Ill. App. 116.

⁶ *Fortune v. Jones*, 30 Ill. App. 116; *Ayers v. Kelley*, 11 Ill. 17.

a special replication, or new assignment;¹ though formerly it was held otherwise.²

New assignments.—It is a general rule, that where the defendant has committed several trespasses, some of which were justifiable, and others not, and the action is brought for those trespasses which were not justifiable, but the defendant by his plea answers only those which were so, (he being by the rules of pleading allowed to suppose that the action was brought for the latter,) the plaintiff should *new assign*. Thus in an action of trespass for an assault, if there have been two assaults, one justifiable, on the ground of self-defense, and the other not, and the declaration contains only one count for an assault, and the defendant pleads *son assault demesne*, the plaintiff should new assign the illegal assault. In a new assignment, the plaintiff avers that he brought his action, not for the trespass in the plea mentioned, but for another and different trespass, committed on another and different occasion—or in trespass to real property, in another and different place, etc.

In general, however, a new assignment is unnecessary, and the replication *de injuria, etc.*, will suffice, when the defendant can not prove *all* the matters which constitute the *substance* of his plea.³ For the law in respect to new assignments, see 1 Chit. Pl. (11 Am. Ed.), 624 to 640; Andrews' Steph. Pl. 281; and for forms, see 3 Chit. Pl. 1213 to 1218; And. Steph. Pl. 283; and see also a form of new assignment to a plea in abatement, *ante*, No. 9a, and a form of new assignment to a plea of *liberum tenementum*, No. 217, *post*.

No. 203. *Plea*—Molliter manus imposuit, to preserve the peace—Plaintiff and a third person fighting together.

(First plea, not guilty, as *ante*, No. 199; second plea as in No. 200, *ante*, to the asterisk, and thence as follows :) that the plaintiff and one O. P., at

¹ 1 Chit. Pl. (11 Am. Ed.), 627; 1 Stephen N. P. 216; *Ayers v. Kelley*, 11 Ill. 17; *Dale v. Erskine*, 35 N. H. 503; *Philbrook v. Foster*, 4 Ind. 442; *Fisher v. Bridges*, 4 Blackf. 518; *Gaither v. Blowers*, 11 Md. 536; *Hannew v. Edes*, 15 Mass. 347; *Ben-*

nett v. Appleton, 25 Wend. 371; see *Fortune v. Jones*, 30 Ill. App. 116.

² 1 Chit. Pl. (11 Am. Ed.), 593, and cases cited.

³ *Reece v. Taylor*, 4 N. & M. 470; *Likes v. Van Dike*, 17 Ohio 444; 2 Swan's Pr. 772, 774, notes.

the said time when, etc., in the county aforesaid, were fighting together, and striving with force and arms to beat and wound each other, against the peace of the people of this state; whereupon the defendant, being then and there present, for the preservation of the peace of the said people, and that the plaintiff and the said O. P. might do no hurt to each other, and in order to separate them, then and there gently laid his hands upon the plaintiff, as he lawfully might for the cause aforesaid; which are the same supposed trespasses in the said declaration mentioned, and whereof the plaintiff has above thereof complained against the defendant. And this the defendant is ready to verify, wherefore he prays judgment, etc.

In trespass for a simple assault, a plea of *molliter manus imposuit*, in reasonable efforts to prevent a breach of the peace by the plaintiff's assault on a third person, is good, but *aliter* when the declaration alleges aggravated force on the part of the defendant.¹

This plea is not a full answer to a declaration charging an assault and *wounding*; and if, when pleaded to such a declaration, issue is taken on a plea, and found for the defendant, judgment must be rendered for the plaintiff, *non obstante veredicto*, for the plea leaves a part of the declaration unanswered.² The plea in such case should either deny the beating, wounding, etc., or state facts and circumstances of resistance, etc., to justify it.³

No. 204. Plea—*molliter manus imposuit*, to put plaintiff out of defendant's dwelling house.

(First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows:) that the defendant, before and at the said time when, etc., was lawfully possessed of a certain dwelling house, with the appurtenances, situate in, etc.; and being so possessed thereof, the plaintiff, just before the said time when, etc., to wit, on the same day in the said declaration mentioned, was unlawfully in the said dwelling house, and with force and arms making a great noise and disturbance therein, and at the said time when, etc., staid and continued therein, making such noise and disturbance, without the leave or license, and against the will, of the defendant, and during all that time there greatly disturbed and disquieted the defendant and his family in the peaceable and quiet possession and enjoyment of his said dwelling house; and thereupon the defendant then and there requested the plaintiff to cease making his said noise and disturbance, and to depart from and out of the said dwelling house; which

¹ *Mellen v. Thompson*, 32 Vt. (3 Shaw) 407; see 3 Chit. Pl. 1068, n.

² *Likes v. Van Dike*, 17 Ohio 456; see 3 Chit. Pl. 1068, n.

³ 2 Swan's Pr. 773, n. a.

the plaintiff then and there wholly refused to do; whereupon the defendant, in defense of the possession of his said dwelling house, at the said time when, etc., gently laid his hands upon the plaintiff, in order to remove, and did then and there remove the plaintiff from and out of the said dwelling house, as he lawfully might for the cause aforesaid; (*) which are the same supposed trespasses in the said declaration mentioned, and whereof the plaintiff has complained against the defendant. And this the defendant is ready to verify; wherefore he prays judgment, etc.

If there was an actual resistance on the part of the plaintiff, and in consequence thereof any *wounding*, or a greater degree of violence on the defendant's part than would otherwise have been justifiable, the facts should be alleged accordingly, which may be done by inserting, at the asterisk in the above form, the following or a similar averment :

“ And because the plaintiff then and there resisted the defendant in that behalf, and assaulted him, and used violent and menacing language and gestures towards him, and would then and there have beaten, bruised and ill-treated the defendant if he had not immediately defended himself against the plaintiff, he, the defendant, did then and there defend himself against the plaintiff, and in so doing did necessarily and unavoidably a little beat, bruise, wound (*etc., according to the facts and the allegations of the declaration,*) doing no unnecessary damage to the plaintiff on that occasion; which are the same,” etc.

The plaintiff may reply *de injuria, etc.*, as *ante*, No. 202. See the observations under that form and No. 201.

No. 205. *Plea by a school-master, justifying a battery, etc.* [12 Ohio, 191.]

(*First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows:*) that the defendant, at the said time when, etc., was a school-master, teaching a certain school in the county aforesaid; and the plaintiff was then a scholar in and attending the said school, and then behaved and conducted himself in an improper and disorderly manner in the said school, and then and there refused to obey the reasonable and necessary rules prescribed for the government of the said school; wherefore the defendant then and there moderately chastised the plaintiff for his said misbehavior, as he lawfully might for the cause aforesaid; which is the same supposed assaulting, etc., in the said declaration mentioned: And this the defendant is ready to verify; wherefore he prays judgment, etc.

The plaintiff may reply *de injuria, etc.* See the observations under Nos. 200 and 201, *ante*.

No. 206. *Plea by a justice of the peace—in an action against him and another—justifying the issuing of a capias, under which plaintiff was arrested and imprisoned.*¹

(*First plea, general issue, as ante, No. 199.*) And for a further plea in this behalf, the defendant C. D. says that the plaintiff ought not to have his aforesaid action against him, the said C. D., because he says that he, the said C. D., before and at the said time when, etc., was a justice of the peace in and for the county aforesaid; and so being such justice, and having jurisdiction of the matters hereinafter mentioned, the defendant E. F., on, etc., there made oath before him, the said C. D., as such justice of the peace, that the plaintiff was indebted to the said E. F. in the sum of — dollars, on a promissory note bearing date, etc., and due on, etc., for the sum aforesaid, and that there was danger that such demand would be lost unless the plaintiff should be held to bail, and stated the cause of such danger, so as to satisfy the said C. D. that the plaintiff had been guilty of fraud, and that there was good reason on the part of the said E. F. to apprehend such danger; and thereupon the said C. D., as such justice as aforesaid, did then and there issue a certain writ of *capias ad respondendum*, in the name of the people of the State of Illinois, directed to any constable of the said county to execute, commanding such constable to take the body of the plaintiff, and to bring him forthwith before the said C. D., as such justice as aforesaid, unless special bail should be entered, and if such special bail should be entered, then to summon the plaintiff to appear before the said C. D., as such justice as aforesaid, at, etc., on, etc., at — o'clock, — M., to answer the complaint of the said E. F. for a failure to pay him a certain demand, not exceeding two hundred dollars, and to make due return of the said writ as the law directs, which said writ the said C. D., as such justice as aforesaid, thereupon, to wit, on the day first aforesaid, there delivered to one G. H., who was then and there a constable of the county aforesaid, to be by him executed according to law; as he, the said C. D., lawfully might for the cause aforesaid; and the said G. H., as such constable as aforesaid, in obedience to the said writ, afterwards, to wit, on the day aforesaid, there gently laid his hands upon the plaintiff, and arrested him, using only necessary force in so doing, and then and there brought the plaintiff (he failing to enter special bail), before the said C. D., as such justice as aforesaid, at, etc., aforesaid, for trial; whereupon the plaintiff then and there confessed a judgment for the sum of — dollars, in favor of the said E. F., and thereupon was then and there released from such arrest; which are the same supposed trespasses in the said declaration mentioned, and whereof the plaintiff has complained, etc. And this the said C. D. is ready to verify; wherefore he prays judgment, etc.

No. 207. *Plea justifying an arrest, as a constable, without process, on suspicion of felony.*

(*First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows:*) that before the said time when, etc.,

¹ *Outlaw v. Davis*, 27 Ill. 469.

to wit, on, etc., in the county aforesaid, *five watches*, of the value of — dollars, the property of one J. K., were feloniously stolen, taken and carried away from and out of the possession of the said J. K.; and shortly afterwards, to wit, at the said time when, etc., the defendant had reasonable and probable cause to suspect, and did suspect, that the plaintiff had feloniously stolen and carried away the said *watches*, in this, to wit, that the plaintiff was then and there found lurking about, in a suspicious manner, near the shop whence the said *watches* were so stolen and carried away, shortly after the same were so stolen and carried away as aforesaid; and also in this, to wit, that upon the plaintiff's being then and there searched, one *watch*, resembling one of the said *watches* so stolen and carried away from the said J. K. as aforesaid, was then and there found in the possession and on the person of the plaintiff, which said *watch*, so found in the possession and on the person of the plaintiff, the defendant then and there had reasonable and probable cause to suspect and believe, and did suspect and believe, to be one of the said *watches* so stolen and carried away from the said J. K. as aforesaid; whereupon, it being then necessary that the plaintiff should be arrested, in order to prevent his escape, the defendant, who was then one of the constables in and for the county aforesaid, for the causes aforesaid then and there gently laid his hands on the plaintiff, and took and arrested him, and conveyed him (*) before one L. M., then one of the justices of the peace in and for the county aforesaid, to be examined by and before the said justice touching the said larceny, and to be further dealt with according to law; and thereupon the plaintiff was then and there detained by order of the said justice, until the — day of ---, in the year aforesaid; on which day the plaintiff was there examined by and before the said L. M., then still being such justice as aforesaid, touching the said larceny, and was thereupon by the said justice then and there discharged out of custody; and by means of the several premises the plaintiff was kept and detained in prison for the space of time in the said declaration mentioned, the same being a reasonable imprisonment, and lawful and just, for the cause aforesaid: which are the same supposed trespasses in the said declaration mentioned, etc. And this the defendant is ready to verify; wherefore he prays judgment, etc.

*No. 208. Another form of plea by an officer, justifying an arrest without process, on suspicion of felony.*¹

(*First plea, not guilty, as ante, No. 199; second plea, as in No. 200, ante, to the asterisk, and thence as follows:*) that shortly before the said time when, etc., to wit, on, etc., in the county aforesaid, *one horse*, of the value of — dollars, the property of one O. P., was feloniously stolen, taken and carried away; and before and at the said time of the committing of the said larceny, the plaintiff was an idle person, dwelling and staying in the neighborhood where the said larceny was committed, and consorting with divers persons of known bad character and repute; and after the committing of the said larceny, and before the said time when, etc., the

¹ *Dodds v. Board*, 43 Ill. 95; *Kindred v. Stitt*, 51 Ill. 401.

defendant was informed that the plaintiff feloniously aided and abetted in the committing of the said larceny; by reason of which premises the defendant, at the said time, when, etc., had good and probable cause to suspect, and did strongly suspect, the plaintiff to have been guilty of, or concerned in, the committing of the said larceny; wherefore the defendant, who was then a constable of the county aforesaid, then and there gently laid his hands on the plaintiff, and arrested him, there then being danger that he would otherwise escape, and conveyed him, etc., (*proceeding in like manner as in the last precedent, from the asterisk to the end.*)

See the remarks under the replication *de injuria, etc.*, No. 202, *ante*.

A peace officer will be justified in making an arrest, in his own county,¹ without warrant, when all the facts show that there was strong probable cause to believe that the accused was guilty, and there was danger of his escape.² In case of felony actually committed, a constable may, upon probable suspicion, arrest the person suspected; but if the suspicion does not arise in the officer's own mind, he should inquire scrupulously into the causes of the suspicion; and he will be justified in making the arrest, should it afterwards appear that no felony had been committed, provided he had reasonable grounds to suspect the person arrested—such grounds as should influence a prudent and cautious man under the circumstances. A constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the suspected person until inquiry can be made by the proper authorities; and whether or not there was such reasonable ground for suspicion, is a mixed question of law and fact—the circumstances to show it reasonable being the fact, but whether, admitting them to be truly alleged, the circumstances amount to a justification, being a question of law.³ In a plea justifying the apprehension of the plaintiff on suspicion of felony, the cause of suspicion must be shown.⁴

¹ *Kindred v. Stitt*, 51 Ill. 401; see *Bessler v. Peats*, 86 Ill. 275; *Blalock v. Randall*, 76 Ill. 224.

² *Dodds v. Board*, 43 Ill. 95.

³ *Kindred v. Stitt*, 51 Ill. 401; see

1 Hill on Torts, 195, a; *Rohan v. Sawin*, 5 Cush. 281; *Davis v. Russell* 5 Bing. 354.

⁴ 4 Taunt. 34; Holt C. N. P. 478; 3, Chit. Pl. 1081, n.

No. 209. *Plea justifying an arrest, etc., by a private person, on a charge of felony.*

(*First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows :*) that the plaintiff, before the said time when, etc., to wit, on, etc., in the county aforesaid, *ten bank bills, each of the denomination and value of* — dollars, the property of the defendant, feloniously did steal, take and carry away; and thereupon the defendant, immediately after the committing of the said larceny, to wit, at the said time when, etc., for the cause aforesaid, and to prevent the escape of the plaintiff, who was then and there endeavoring to escape, there gently laid hands on the plaintiff, and gave him in charge to one J. K., then being one of the constables in and for the county aforesaid; and on that occasion the said J. K. (so being such constable), at the request of the defendant, then and there took the plaintiff into custody, and conveyed him before one L. M., then being one of the justices of the peace in and for the county aforesaid, to be examined before the said justice touching the said larceny, and to be further dealt with according to law; and by means of the premises the plaintiff was imprisoned, and detained in prison, for the space of time in the said declaration mentioned, the same being a reasonable imprisonment, and lawful and just for the cause aforesaid, which are the same supposed trespasses in the said declaration mentioned, etc. And this the defendant is ready to verify; wherefore he prays judgment, etc.

See the observations under the replication *de injuria, etc.*, No. 202, *ante*.

When the magistrate has full possession of the charge, the party laying it, in general, ceases to be an actor in the matter, and need not justify acts done subsequently.¹ A private individual may arrest a person guilty of crime, when it is necessary to prevent the escape of the accused, and have him taken before a proper officer for examination. But such private individual can not justify such arrest on the ground of a suspicion of guilt only; guilt in such case must be shown.² There is, however, some conflict of authorities on this point. See precedents of pleas by private individuals, justifying arrests on *suspicion* of felony.³

No. 210. *Plea by a sheriff, justifying the taking of goods, etc., under a fieri facias.*

(*First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows :*) that one J. K., before the said time

¹ 3 Chit Pl. 1080, n.

³ 3 Chit. Pl. 1081; 2 Swan's Pr. 780.

² *Dodds v. Board*, 43 Ill. 95; *Kindred v. Stitt*, 51 Ill. 401.

when, etc., to wit, on, etc., sued out of the — court of the said county of — a certain writ of *fiery facias*, of that date, directed to the sheriff of the county aforesaid, by which said writ the people of the State of Illinois commanded such sheriff that of the goods and chattels, lands and tenements, in his county, of the plaintiff, such sheriff should cause to be made the sum of — dollars, damages, and the sum of — dollars, costs of suit, which by the consideration of the same court, on, etc., in the — term, etc., the said J. K. recovered against the plaintiff, together with interest thereon at the rate of five per centum per annum from the time of the recovery of the same as aforesaid, and also the further sum of — — accruing costs on the said judgment, and that such sheriff should have those moneys ready to render to the said J. K., according to law, and should make return of the said writ in ninety days after the said date thereof; which said writ afterwards, and before the said time when, etc., to wit, on the said day of the date thereof, was there delivered to the defendant, who then and from thenceforth until and at and after the said time when, etc., was sheriff of the county aforesaid, to be executed in due form of law; (*) by virtue of which said writ the defendant, as such sheriff as aforesaid, afterwards, and before the return day of the said writ, to wit, at the said time when, etc., [peaceably and quietly entered into the said dwelling house in which, etc., (the outer door thereof being then open), in order to seize and take, and then and there] seized and took in execution the said goods and chattels of the plaintiff, in the said declaration mentioned, the same then and there being [in the said dwelling house, and] liable to be seized and taken by virtue of the said writ, (which was then in full force and unsatisfied) for the purpose of levying the moneys in the said writ mentioned; [and in so doing the defendant then and there necessarily and unavoidably made a little noise and disturbance in the said dwelling house, and continued therein, making such noise and disturbance, for the space of time in the said declaration mentioned, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on that occasion:] and afterwards, and before the return day of the said writ, to wit, on, etc., in the county aforesaid, the defendant, upon due notice given according to law, sold the said goods and chattels, and by such sale thereof caused to be made the sum of — dollars [parcel of] the damages and costs aforesaid; which are the same supposed trespasses in the said declaration mentioned, etc. And this the defendant is ready to verify; wherefore he prays judgment, etc.

The allegation of the sale of the goods is perhaps unnecessary, and should of course be omitted if there has been no sale. A plea of jurisdiction under any other form of process can readily be framed from the above precedent. It is said that an officer justifying under *mesne* (not *final*) process, must show a return.¹

¹ Tidd (9 Ed.), 1023, a; 3 Chit. Pl. 1135, n; *Cheasley v. Barnes*, 10 East 82; *Edwards v. Lucas*, 5 B. & C. 339.

Where the plaintiff in the original action justifies under a *feri facias* he must allege a judgment, but an officer need not; and in trespass against both, if there is any doubt as to the regularity of the judgment, the latter should plead separately.¹

It sometimes happens, where there is an execution against a debtor, that a fraudulent conveyance of his goods to a third person, in whose house they are taken, is set up, and the latter brings an action of trespass; in which case the jurisdiction must be confined to the entry into the house, and the plaintiff's property in the goods disputed under the general issue. The plea in such case is similar to the above form, but alleging an execution against "one L. M.," and at the asterisk inserting this averment: "And the defendant further says, that before and at the said time when, etc., divers goods and chattels of said L. M., liable to be taken in execution by virtue of the said writ, were in the said dwelling house in which, etc.; and that thereupon, by virtue of the said writ, the defendant," etc.—alleging the entry into the plaintiff's dwelling-house, and the seizure of the goods of L. M. therein, and omitting what relates to the sale of the goods.² See the observations under forms No. 200 and 202, *ante*.

No. 211. *Replication—to a plea of justification under process—protesting or admitting the process, and de injuria, etc., as to the residue.*

(As in No. 202, *ante*, to the asterisk, and thence as follows :) because protesting that the said writ of — was not issued, or delivered (or, "although true it is that the said writ of — was issued, and delivered") to the defendant as such *sheriff*, in manner and form as the defendant has above in his *second* plea alleged, nevertheless, for replication in this behalf, the plaintiff says, that the defendant, at the said time when, etc., of his own wrong, and without the residue of the cause in that plea alleged, committed the trespasses in the said declaration mentioned, in manner and form as the plaintiff has therein above complained against the defendant. And this the plaintiff prays may be inquired of by the country, etc.

See the remarks under the replication *de injuria, etc.*, No. 202, *ante*.

¹ Com. Dig. Plead. 3, M. 24; 3 Chit. Pl. 1133, n; see *Jackson v. Hobson*, 4 Scam. 411.

² 3 Chit. Pl. 1135.

No. 212. *Plea (in trespass for driving a carriage against the plaintiff's) that the injury was caused by the plaintiff's negligence.*

(First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows:) that before and at the said time when, etc., he, the defendant, was driving his said carriage in and along the said highway, the said carriage of the plaintiff then also being and going in and along the said highway; nevertheless the defendant in fact says that the said carriage of the plaintiff, at the said time when, etc., was so carelessly, negligently and improperly managed in the said highway, near to the said carriage of the defendant, that by reason thereof the said carriage of the defendant, by accident, and without any default on the part of the defendant, but by and through the want of due care in the management of the said carriage of the plaintiff, then and there was driven upon and against the said carriage of plaintiff, and thereby the plaintiff sustained the injury in the said declaration mentioned; and so the defendant in fact says, that if any hurt or damage happened to the plaintiff or his said carriage, it was caused by such accident, and not by the default of the defendant; which are the same supposed trespasses in the said declaration mentioned. And this the defendant is ready to verify; wherefore he prays judgment, etc.

The general replication *de injuria etc.*, No. 202, ante, may be replied to the above plea.

No. 213. *Plea of license.*

(First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows: (that he, the defendant, at the said time (or "several times") when, etc., by the leave and license of the plaintiff to him for that purpose given and granted, committed the several supposed trespasses in the said declaration mentioned, as he lawfully might for the cause aforesaid: And this the defendant is ready to verify; wherefore he prays judgment, etc.

No. 214. *Replication to plea of license.*

(As in No. 202, ante, to the asterisk, and thence as follows:) because he says, that the defendant, at the said time (or "several times") when, etc., of his own wrong, and without the leave and license of the plaintiff to him, the defendant, first given and granted, committed the said trespasses, in manner and form as the plaintiff has above thereof complained against him: And this the plaintiff prays may be inquired of by the country, etc.

Where there has been a revocation of the license before the trespass, it should be set up in a replication.¹ In trespass, a license must be specially pleaded, and can not be given in evi-

¹ *Greene v. Jones*, 1 Saund. 300, a; But see *Barnes v. Hunt*, 11 East Mellor v. Walker, 2 Saund. 5, n. 3. 421; 3 Chit. Pl. 1210, n.

dence under the plea of not guilty.¹ The plea of license may be supported by proof of a license in law, as well as in fact, and it is immaterial whether it be expressed or implied from circumstances.² Evidence of a familiar intimacy in the family may be given in support of this plea.³ An entry to execute legal process, or to distrain for rent, or for damage; or an entry by a remainderman or a reversioner, to see whether waste has been done, or repairs made; or by a commoner, to view his cattle; or by a traveler, into an inn; or by a landlord, to take possession after the expiration of the tenant's lease; or an entry into another's house at usual and reasonable hours, and in the customary manner, for any of the ordinary purposes of life; may be given in evidence under this plea.⁴

The evidence must cover all the trespasses proved, or it will not sustain the justification.⁵ Evidence of a verbal agreement for the sale of the land by the plaintiff to the defendant, is admissible under a plea of license to enter, and may suffice to support the plea as to the entry only; but it is not sufficient to maintain the plea in respect to any act which a tenant at will may not lawfully do.⁶ Nor will such license avail to justify acts done after it has been revoked.⁷

Where a *license in law* is pleaded, the plaintiff can not give in evidence a subsequent act of the defendant, which renders him a trespasser *ab initio*; but it must be specially replied.⁸ So if the defendant justifies as preventing a tortious act of the plaintiff, and the plaintiff relies on a license to do the act, he can not give the license in evidence under the general replication *de injuria, etc.*, but must allege it in a special replication.⁹

¹ *Babcock v. Lamb*, 1 Cow. 238; *Hetfield v. R. R. Co.*, 5 Dutch. 571; *Crabs v. Fetick*, 7 Blackf. 373; 1 Chit. Pl. (11 Am. Ed.) 505.

² 2 Greenl. Ev., § 627.

³ *Adams v. Truman*, 12 Johns. 408.

⁴ 2 Greenl. Ev., § 627; 3 Camp. 524; *Revett v. Brown*, 5 Bing. N. C. 7; 5 Com. Dig. Pl. 895; see *Reeder v. Purdy*, 41 Ill. 279.

⁵ *Barnes v. Hunt* 11 East. 451; 12 Price 369; 12 Price 390.

⁶ *Carr v. Roots*, 2 M. & W. 248; *Suffern v. Townsend*, 9 Johns. 35; *Cooper v. Stower*, 9 Johns. 331.

⁷ *Cheever v. Pearson*, 16 Pick. 266.

⁸ *Aitken v. Blades*, 5 Taunt. 198; *Taylor v. Cole*, 3 Term. 292.

⁹ *Taylor v. Smith*, 7 Taunt. 156; 2 Greenl. Ev., § 628.

No. 215. *Plea of liberum tenementum.*

(*First plea, not guilty, as ante, No. 199; second plea as in No. 200, ante, to the asterisk, and thence as follows:*) that the close in the said declaration mentioned, and in which, etc., *now is, and* at the said time (or “several times”) when, etc., was the close, soil and freehold of the defendant; wherefore the defendant at the said time (or “several times,”) when, etc., committed the several supposed trespasses in the said declaration mentioned, in the said close in which, etc., as he lawfully might for the cause aforesaid: And this the defendant is ready to verify; wherefore he prays judgment, etc.

Where one of two defendants justifies as the servant of the other, the freeholder, the plea should allege that the close was “the close, soil and freehold of the said C. D.; wherefore the said C. D. in his own right, and the said E. F. as his servant, and at his command,” etc., committed the supposed trespasses, etc.

If the action is for injuries to real property *only*, there is no occasion for any recital in the commencement of the plea; but otherwise it is necessary to qualify the plea in its commencement, by reciting the trespasses to the realty, to which trespasses alone the plea relates. (See the remarks, *ante*, under form No. 200.) In this case, after the averment of freehold, the language of the plea should be, “wherefore the defendant, at the said time when, etc., committed the several supposed trespasses in the *introductory part of this plea* mentioned,” etc.

The plea of *liberum tenementum*, (or, as it is frequently called, the “common bar,”) admits that the plaintiff was in possession of the close described in the declaration, and that the defendant did the acts complained of, raising only the question whether the close described is the defendant’s freehold or not;¹ and his title must be proved, either by deed or other documentary evidence, or by an actual, adverse and exclusive possession for twenty years, inasmuch as under this issue he undertakes to show a title in himself, which shall do away with the presumption arising from the plaintiff’s possession.² Proof of a tenancy in common with the plaintiff is not admissible

¹ *Cocker v. Crompton*, 1 B. & C. 489; *Lemprier v. Humphrey*, 3 Ad. & El. 181; *Doe v. Wright*, 10 Ad. & El. 763; see *Dean v. Comstock*, 32

Ill. 173; *Ry. Co. v. Morrison*, 160 Ill. 288.

² *Brest v. Lever*, 7 M. & W. 593; see *Beach v. Livergood*, 15 Ind. 496.

under this plea.¹ If the defendant succeeds in establishing a title to that part of the close on which the trespass was committed, he is entitled to recover, though he does not prove a title to the whole close; the words, "the close in which," etc., constituting a divisible allegation.² Under this plea any estate of *freehold*, as in fee, in tail, or for life, but not a freehold in remainder or reversion, may be given in evidence.³

It is held in Illinois that, although the owner in fee of the land is kept out of the possession, he can not be permitted to enter against the will of the occupant; and that the common-law right to enter, and use all necessary force to obtain the possession from him who may wrongfully withhold it, has been taken away by the statute of forcible entry and detainer.⁴

It has been held that if, in an action of trespass *quare clausum fregit*, the defense pleaded is *liberum tenementum*, judgment for the plaintiff is conclusive upon the defendant when he afterwards attempts to set up title, subject to the qualification that the close described in the second action is the same as that described in the first.⁵

The common bar is rarely of any other utility than to compel a *new assignment*, describing the close, when it has not been particularly described in the declaration;⁶ though the plea may sometimes be useful and proper for other purposes.⁷ In regard to this plea, see 3 Chitty on Pleading, index, title *liberum tenementum*, Gould's Pleading, cap. 6, §§ 91, 92, 93, and Andrews' Steph. Pl. § 178.

No. 216. *Replication to a plea of liberum tenementum, denying it.*

(As in No. 202, ante, to the asterisk, and thence as follows :) because he says, that the said close in which, etc., *is not now, and* at the said time (or "several times") when, etc., was not the close, soil and freehold of the defendant, in manner and form as he has above in his said *second* plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

¹ Gow. 201; *Roberts v. Dame*, 11 N. H. 226; see *Jewett v. Foster*, 14 Gray 495.

² *Smith v. Roy*, 8 M. & W. 381; *Richards v. Peake*, 2 B. & C. 918; 2 Greenl. Ev., §§ 618, 626.

³ 1 Chit. Pl. (11 Am. Ed.), 503.

⁴ *Reeder v. Purdy*, 41 Ill. 279;

Reeder v. Purdy, 48 Ill. 261; *Page v. De Puy*, 40 Ill. 506.

⁵ *Elson v. Comstock*, 150 Ill. 303.

⁶ 1 Chit. Pl. (11 Am. Ed.), 503; Gould's Pl., c. 6, §§ 91-93.

⁷ 1 Chit. Pl. (11 Am. Ed.), 595; 3 *Id.*, 1098, n.

No. 217. *New assignment.*

(As in No. 202, ante, to the asterisk, and thence as follows:) because he says, that the said close in which, etc., now is, and at the said time (or "several times") when, etc., was a certain close in the county aforesaid, known and described as (*here describe the land*); which said close now is, and at the said time (or "several times") when, etc., was another and different close from the close in the said second plea of the defendant mentioned, and therein alleged to be the close, soil and freehold of the defendant. And this the plaintiff is ready to verify; wherefore, inasmuch as the defendant has not answered the said trespasses by him committed in the said close in which, etc., above newly assigned, the plaintiff prays judgment, and his damages on occasion of the committing of the said trespasses, above newly assigned, to be adjudged to him, etc.

To the plea of *liberum tenementum*, the plaintiff may reply, according to the facts, in either of four ways: *First*, if the close has been so minutely described in the declaration that there can be no question what close is meant, and the plaintiff's title is inconsistent with that of the defendant, then the replication should deny that the close is the defendant's freehold, and should conclude to the country; *second*, if the plaintiff derives title under the defendant, then the plaintiff, confessing the defendant's title, must reply the lease, or some other title, under him, concluding with a verification; *third*, if the plaintiff neither derives title under the defendant, nor has a title inconsistent with the defendant's, he may reply that before the defendant had anything in the premises, another person was seized, and made a lease to another person under whom the plaintiff claims, stating his derivative title, without either expressly confessing or denying the defendant's plea, and concluding with a verification; or, *fourth*, if the declaration does not specify the *locus in quo*, and there is any reason to apprehend that the defendant has any land in the same county, the plaintiff must new assign, setting out the *locus in quo* with more particularity.¹

The plea of *liberum tenementum* is a good plea to an action of trespass *quare clausum fregit* in Illinois.²

¹ 1 Chit. Pl. (11 Am. Ed.) 595; see 3 Chit. Pl. 1209, n., 1216; Gould's Pl. Cap. 6, Sec. 93; *Hyatt v. Wood*, 4 Johns. 150; *Austin v. Morse*, 8 Wend. 477; *Collum v. Andrews*, 6 Watts, 516.

² *Lodge v. Klein*, 115 Ill. 177; *Piper v. Connelly*, 108 Ill. 646; *Farwell v. Warren*, 51 Ill. 467; *Haskins v. Haskins*, 67 Ill. 446; *R. R. Co. v. Cobb*, 68 Ill. 53; *R. R. Co. v. Cobb*, 94 Ill. 55.

CHAPTER XI.

ATTACHMENT.

The writ of attachment, in civil actions at law, is a species of process upon which the property of a defendant may be seized and held to satisfy the judgment which the plaintiff may obtain. The proceeding is wholly statutory, and the enactments on the subject, in the various states, differ materially in their provisions. It is only proposed, in this chapter, to consider this remedy as it exists under the laws of Illinois.

Nature of the proceeding, etc.—The proceeding by attachment is *in rem*; and unless there has been a seizure of property of the defendant, or a garnishee has been summoned, or there has been actual service on the defendant, or an appearance entered by him, the court has no jurisdiction to proceed to judgment.¹

In an action commenced by attachment where there has been constructive notice only, by publication, if the defendant appears and pleads to the action, the suit thereby becomes a proceeding *in personam*, and a judgment *in personam* may be rendered against the defendant.²

When the defendant has been served with the writ, or appears to the action, the judgment has the same force and effect as in suits commenced by summons; and execution may issue thereon not only against the property attached, but the other property of the defendant.³

¹ *Martin v. Dryden*, 1 Gilm. 187; *Haywood v. Collins*, 60 Ill. 328; *West v. Schnebly*, 54 Ill. 523; *People v. Cameron*, 2 Gilm. 468; *Clymore v. Williams*, 77 Ill. 618; *Borders v. Murphy*, 78 Ill. 81; *Schrorer v. Pettibone*, 58 Ill. App. 436.

² *Kerr v. Swallow*, 33 Ill. 379; *Conn v. Caldwell*, 1 Gilm. 531; *Martin v. Dryden*, 1 Gilm. 187; *Swift v. Lee*, 65 Ill. 336.

³ 1 Starr & Curtis 324; Rev. Stat. (1893) 174; Rev. Stat. (1895) 178; *Conn v. Caldwell*, 1 Gilm. 531; *Young*

The benefit of the remedy is not confined to any particular form of action. Any creditor is authorized, under certain circumstances, to sue out an attachment; and an action of account may be commenced in this manner.¹ A creditor may proceed by attachment and by petition for a mechanic's lien, as concurrent remedies.²

Proceedings by attachment, being in derogation of the common law, and deriving all their validity from statutes, must in all essential particulars conform to the requirements of such statutes.³

In what cases attachment lies, etc.—Section 1 of the Attachment act provides that a creditor may have an attachment against the property of his debtor, or that of any one or more of several debtors, when the debt exceeds twenty dollars, in any of the following cases:

1st. Where the debtor is not a resident of the state.

2d. When the debtor conceals himself, or stands in defiance of an officer, so that process can not be served upon him.

3d. Where the debtor has departed from the state, with the intention of having his effects removed therefrom.

4th. Where the debtor is about to depart from the state, with the intention of having his effects removed therefrom.

5th. Where the debtor is about to remove his property from the state, to the injury of such creditor.

6th. Where the debtor has, within two years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

7th. Where the debtor has, within two years prior to the filing of such affidavit, fraudulently concealed or disposed of his property, so as to hinder or delay his creditors.

8th. Where the debtor is about fraudulently to conceal, assign or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

9th. Where the debt sued for was fraudulently contracted on the part of the debtor; *provided*, the statement of the debtor, his agent or attorney, which constitute the fraud, shall

v. *Campbell*, 5 Gilm. 80; *Kerr v. Swallow*, 33 Ill. 379.

¹ *Humphreys v. Matthews*, 11 Ill. 471.

² *West v. Fleming*, 18 Ill. 248; *Delehay v. Clement*, 3 Scam. 201; *Culver v. Elwell*, 73 Ill. 537.

³ *Moore v. Hamilton*, 2 Gilm. 429; *Cariker v. Anderson*, 27 Ill. 358; *Thornmeyer v. Sisson*, 83 Ill. 188; *Reitz v. People*, 77 Ill. 518; *Haywood v. Collins*, 60 Ill. 328; see *R. R. Co. v. Crane*, 102 Ill. 249; *Dennison v. Blumenthal*, 37 Ill. App. 385.

have been reduced to writing, and his signature attached thereto by himself or his agent or attorney.¹

It is further provided that the act shall be construed in all courts in the most liberal manner for the detection of fraud.²

Commencement of proceeding—Affidavit, etc.—Section 2 provides, that to entitle a creditor to a writ of attachment, “he or his agent or attorney shall make and file with the clerk of such court, an affidavit, setting forth the nature and amount of the indebtedness, after allowing all just credits and set-offs, and any one or more of the causes mentioned in the preceding section, and also stating the place of residence of the defendant, if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same.”³

The statute further provides that “it shall be sufficient, in all cases of attachment, to designate defendants by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known; and heirs, executors and administrators of deceased defendants are subject to the provisions in all cases in which it may be applicable to them.”⁴

No. 218. Affidavit for attachment.

STATE OF ILLINOIS, }

County of — } sct. A. B., of, etc., makes oath and says, that C. D. is indebted to him, the said A. B., in the sum of — dollars, (after allowing all just credits, deductions and set-offs,) for (*here set forth the nature of the debt*); and that the said C. D. (*here set forth one or more of the causes mentioned in the statute.*) And this affiant further says, that the place of residence of the said C. D. is — — (or, “is unknown to this affiant, and upon diligent inquiry he has not been able to ascertain the same.”)

A. B.

Subscribed and sworn, etc.

¹ 1 Starr & Curtis, 310; Rev. Stat. (1893) 169; Rev. Stat. (1895) 173; see *Spear v. Joyce*, 27 Ill. App. 456; *Boggs v. Bindskoff*, 23 Ill. 66; *Young v. Nelson*, 25 Ill. 565; *Laflin v. Pub. House*, 52 Ill. 432; *Bryant v. Simon-eau*, 51 Ill. 324; *Shove v. Farwell*, 9 Bradw. 256; *Winkler v. Barthel*, 6 Bradw. 111; *Yates v. Dodge*, 123 Ill. 50; *Weare v. Druley*, 156 Ill. 24; *Standard v. Morrison*, 54 Ill. App. 531.

² 1 Starr & Curtis, 327; Rev. Stat. (1893) 174; Rev. Stat. (1895) 178; *Dodge v. Yates*, 21 Ill. App. 547; *Everingham v. Bank*, 124 Ill. 527.

³ Rev. Stat. (1893) 169; Rev. Stat. (1895) 173; 1 Starr & Curtis, 310; *Hogue v. Corbit*, 156 Ill. 540.

⁴ *Reitz v. People*, 77 Ill. 518; *Prins v. Hinchcliff*, 17 Brad. 153; *Buchman v. Dodds*, 6 Brad. 25; *Hill v. Harding*, 93 Ill. 77; *Ry. Co. v. Packet Co.*, 108 Ill. 317.

When made by an agent or attorney, the affidavit should commence thus: "E. F., of, etc., makes oath and says that he is the agent (*or* 'attorney') in this behalf of A. B., of, etc.; and that C. D. is indebted to the said A. B.," etc.

The statute concerning oaths and affirmations provides that

"All oaths and affirmations, required or authorized to be taken by any law of the state, when the person required to make or take the same shall reside out of or be absent from this state, may be administered by any notary public, or clerk of a court having a seal, to be certified to by such officer under his official seal, or of the court of which he is clerk."¹

Within the state, an affidavit may be made before any court, or any judge, justice or clerk thereof, or any notary public, justice of the peace,² or master in chancery,³ in their respective districts, circuits or counties.

The affidavit must be positive and unequivocal in its terms; statements upon information and belief are insufficient;⁴ but if it is defective it may be amended.⁵

The affidavit should state the full amount due, as a judgment can not be rendered, where there is no personal service, or appearance, for a greater sum than that claimed in the affidavit, with the accrued interest.⁶ Nor should the judgment exceed the amount laid in the *ad damnum* clause of the declaration.⁷ Attachment will not lie if no part of the debt is due.⁸

Traversing affidavits.—Section 27 provides that

"The defendant may plead traversing the facts stated in the affidavit upon which the attachment issued, which plea shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may

¹ 2 Starr & Curtis, 1677; Rev. Stat. (1893) 999; Rev. Stat. (1895) 1067.

² *Ib.*

³ *Ib.*

⁴ *Dyer v. Flint*, 21 Ill. 80; *Booth v. Rees*, 26 Ill. 48; *Archer v. Claflin*, 31 Ill. 306; *Prins v. Hinchcliff*, 17 Bradw. 153.

⁵ *Miere v. Brush*, 3 Scam. 21; *Campbell v. Whetstone*, 3 Scam. 361; *Archer v. Claflin*, 31 Ill. 306;

Moore v. Mauck, 79 Ill. 391; *Page v. Dillon*, 61 Ill. App. 282.

⁶ *Rowley v. Berrian*, 12 Ill. 198; *Tunnison v. Field*, 21 Ill. 108; *Hickins v. Lyon*, 35 Ill. 150; *Hobson v. Emporium*, 42 Ill. 306.

⁷ *Hichins v. Lyon*, 35 Ill. 150; see *Adams v. Merritt*, 10 Bradw. 275.

⁸ *Drake on Att.*, 5 Ed., 273, 274; *Schilling v. Deane*, 36 Ill. App. 513.

plead or demur to the action as in other cases; but if found for the defendant, the attachment shall be quashed and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons."

This section warrants the trial of an attachment issued before the hearing upon the case to which it is an adjunct. It is not compulsory to submit both issues at the same time to one jury, and the parties may consent to separate trials, or the court in its discretion may so order.¹

Where an affidavit for an attachment in aid is traversed by a plea in denial, the defendant is entitled to a trial upon the issues so formed, and a judgment taken against persons summoned as garnishees before the issue is disposed of, is irregular.²

Amendments.—The statute (section 28) also provides that

"No writ of attachment shall be quashed nor the property taken thereon restored, nor any garnishee discharged, nor any bond by him given canceled, nor any rule entered against the sheriff discharged, on account of any insufficiency of the original affidavit, writ of attachment or attachment bond, if the plaintiff, or some credible person for him, shall cause a legal and sufficient affidavit or attachment bond to be filed, or the writ to be amended, in such time and manner as the court shall direct; and in that event the cause shall proceed as if such proceedings had originally been sufficient."³

Where the suit is to be brought.—Proceedings in attachment are required to be commenced in the county where the defendant may be found, or where he has property or funds liable to garnishment; and service must be had upon him or his property, etc., in order to give the court jurisdiction.⁴ But "the creditor may, at the same time, or at any time before judgment, cause an attachment writ to be issued to any other county in the state, where the debtor may have property liable to be attached, which shall be levied as other attachment writs; *provided*, that if no property, rights or credits of the debtor are found in the county in which the suit is brought, and no

¹ *Page v. Dillon*, 61 Ill. App. 282.

² *Crandall v. Birge*, 61 Ill. App. 234.

³ 1 Starr & Curtis, 322; Rev. Stat. (1893), 173; Rev. Stat. (1895), 177; see *Roberts v. Dunn*, 71 Ill. 46; *Smith v. Clinton*, 13 Ill. App. 572; *Bailey*

v. Bank, 127 Ill. 332; *Page v. Dillon*, 61 Ill. App. 282.

⁴ *Hinman v. Rushmore*, 27 Ill. 509; *Fuller v. Langford*, 31 Ill. 248; *House v. Hamilton*, 43 Ill. 185; *West v. Schnebly*, 54 Ill. 523.

defendant is served with summons or makes appearance, the creditor shall not be entitled to judgment."¹

Plaintiff required to give bond.—Section 4 provides that

"Before granting an attachment, as aforesaid, the clerk shall take bond and sufficient security, payable to the defendant against whom the writ is to be issued, in double the sum sworn to be due, conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in said proceedings, and all damages and costs which shall be recovered against the plaintiff, for wrongfully suing out such attachment—which bond, with affidavit of the party complaining, or his agent or attorney, shall be filed in the office of the clerk granting the attachment. Every attachment issued without a bond and affidavit taken, is hereby declared illegal and void, and shall be dismissed."²

If the bond is found to be defective, it may be amended.³ Objections to a defective bond must be made in apt time. It is too late to object to such bond after the cause is removed to the supreme court.⁴ The statute gives the form of the plaintiff's bond as well as of the writ of attachment.⁵

Attachment against joint debtors.—Section 7 provides that

"In all cases where two or more persons are jointly indebted, either as partners or otherwise, and an affidavit shall be filed as provided in the first section of this act, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the provisions of this act; and the officer shall be also directed in said writ to summon all joint debtors named in the affidavit filed in the case, whether the attachment is against them or not, to answer to the said action, as in other cases of joint defendants."⁶

Under the Illinois statute an attachment against a partnership by the firm name, as an entity, can only be sustained when the affidavit discloses grounds of attachment against

¹ Starr & Curtis 316; Rev. Stat. (1893) 170; Rev. Stat. (1895) 174; see *Haywood v. McCrary*, 33 Ill. 460; *Lawver v. Langhans*, 85 Ill. 138; *Buchman v. Dodds*, 6 Brad. 25; *Field v. Shoop*, 6 Bradw. 445; *Kellogg v. Shoop*, 6 Bradw. 454.

² 1 Starr & Curtis 311; Rev. Stat. (1893) 169; Rev. Stat. (1895) 173.

³ See *Singleton v. Wafford*, 3 Scam.

577; *Turner v. Armstrong*, 9 Bradw. 24.

⁴ *Morris v. Trustees*, 15 Ill. 266; *Lawver v. Langhans*, 85 Ill. 138; *Miere v. Brush*, 3 Scam. 21.

⁵ 1 Starr & Curtis 312; Rev. Stat. (1893) 169; Rev. Stat. (1895) 173.

⁶ 1 Starr & Curtis 312; Rev. Stat. (1893) 170; Rev. Stat. (1895) 174.

each of the partners, and when such grounds exist. All the partners must be brought within the jurisdiction of the court.¹

Execution of the writ—Service on the defendant, etc.—Section 8 provides that

“The officer shall without delay execute such writ of attachment upon the lands, tenements, goods, chattels, rights, credits, moneys and effects of the debtor, or upon any lands or tenements in and to which such debtor has or may claim any equitable interest or title, of sufficient value to satisfy the claim sworn to, with costs of suit as commanded in such writ.”²

It has been held that this statute should be liberally construed and that whatever is the proper subject of seizure and sale on execution, may be taken in a proceeding by attachment, and held subject to sale under the judgment that may be recovered. Shares of stock in an incorporated company are subject to attachment under the laws of this state. In case the shares have been attached, the purchaser at the sheriff's sale on execution will be entitled to all the dividends accruing after the attachment.³ Alias attachment writs are not authorized by the statute.⁴

Certificate of levy.—Section 9 provides that

“When a writ of attachment is levied upon any real estate, in any case, it shall be the duty of the officer making the levy to file a certificate of such fact with the recorder of the county where such land is situated; and from and after the filing of the same such levy shall take effect, as to creditors and *bona fide* purchasers, without notice, and not before.”⁵

Serving defendant—Return, etc.—Sections 10, 11 and 12 provide that

“The officer shall also serve said writ upon the defendant therein, if he can be found, by reading the same to him or delivering a copy thereof. The return to such writ shall state the particular manner in which the same was served.”⁶

¹ Bates on Partnership, Sec. 1117; *Lawrence v. Steadman*, 49 Ill. 270; *Hinman v. Opera Co.*, 49 Ill. App. 135.

² 1 Starr & Curtis, 313; Rev. Stat. (1893) 170; Rev. Stat. (1885), 174; see *May v. Baker*, 15 Ill. 89; *Lovely v. Wright*, 15 Ill. 95; *West v. Schnebly*, 54 Ill. 523; *Clymore v. Williams*, 77 Ill. 618; *Bank v. Keeler*, 103 Ill. 425; *Culver v. Rumsey*, 6 Bradw. 598;

Culver v. Rumsey, 7 Bradw. 442; *Wallace v. Monroe*, 22 Ill. App. 602.

³ *Bank v. Byram*, 131 Ill. 92.

⁴ *Dennison v. Blumenthal*, 37 Ill. App. 385.

⁵ See *Martin v. Dryden*, 1 Gilm. 187; *Pearl v. Wellman*, 3 Gilm. 311; *Jones v. Jones*, 16 Ill. 117.

⁶ 1 Starr & Curtis 315; Rev. Stat. (1893), 170; Rev. Stat. (1895), 174; see *Reitz v. People*, 77 Ill. 518.

If it shall appear, by the affidavit, that a debtor is actually absconding, or concealed, or stands in defiance of an officer duly authorized to arrest him on civil process, as aforesaid, or has departed this state with the intention of having his effects and personal estate removed out of the state, or intends to depart with such intention, it shall be lawful for the clerk to issue, and the sheriff or other officer to serve, an attachment against such debtor, on a Sunday as on any other day.¹ If the defendant, or any person for him, shall be in the act of removing any personal property, the officer may pursue and take the same in any county in this state, and return the same to the county from which such attachment issued."²

The declaration, etc.—The declaration is to be in form to correspond with the nature of the action in which the attachment has issued. It must be filed on the return of the attachment, or at the term of the court when the same is made returnable. If the declaration is not so filed, the defendant may, in the discretion of the court, have the suit dismissed;³ but the plaintiff has the whole term in which to file a declaration. The defendant may, however, obtain a rule on the plaintiff to file a declaration within a reasonable time during the return term; and upon a failure to comply with the rule, the suit may be dismissed. The statute applies as well to cases where there is as where there is not personal service.⁴

The declaration must be limited to the cause of action specified in the affidavit. If the plaintiff might recover under the common counts, on the cause of action set forth in the affidavit, commencing by attachment does not deprive him of the right to declare in that way.⁵

Garnishees.—Section 21 of the statute provides that

"When the sheriff or other officer is unable to find property of any defendant, sufficient to satisfy any attachment issued under the provisions of this act, he shall summon the persons

¹ 1 Starr & Curtis 316; Rev. Stat. (1893) 170; Rev. Stat. (1895), 174; see *Thomas v. Hinsdale*, 78 Ill. 259.

² See *House v. Hamilton*, 43 Ill. 185.

³ 1 Starr & Curtis 320; Rev. Stat. (1893), 172; Rev. Stat. (1895), 176; *Thompson v. Conover*, 12 Bradw. 302.

⁴ *Stoddard v. Miller*, 29 Ill. 291; *White v. Hogue*, 18 Ill. 150; *Plato v. Turrill*, 18 Ill. 273; see *Craft v. Turney*, 25 Ill. 324; *Lawver v. Langhans*, 85 Ill. 138; *Bartlett v. Sullivan*, 87 Ill. 219.

⁵ *Tunnison v. Field*, 21 Ill. 103; see *Plato v. Turrill*, 18 Ill. 273.

mentioned in such writ as garnishees, and all other persons within his county whom the creditor shall designate as having any property, effects, choses in action or credits, in their possession or power belonging to the defendant, or who are in anywise indebted to such defendant, the same as if their names had been inserted in such writ; the persons so summoned shall be considered as garnishees, and the sheriff shall state, in his return, the names of all persons so summoned, and the date of such service on each."¹

Notice to the defendant by publication.—Section 22 provides that

"When it shall appear by the affidavit filed, or by the return of the officer, that a defendant in any attachment suit is not a resident of this state, or the defendant has departed from this state, or on due inquiry can not be found, or is concealed within this state, so that process can not be served upon him, it shall be the duty of the clerk of the court in which the suit is pending to give notice, by publication at least once in each week for three weeks successively, in some newspaper published in this state, most convenient to the place where the court is held, of such attachment, and at whose suit, against whose estate, for what sum, and before what court the same is pending; and that unless the defendant shall appear, give bail, and plead within the time limited for his appearance in such case, judgment will be entered, and the estate so attached will be sold. And such clerk shall, within ten days after the first publication of such notice, send a copy thereof by mail, addressed to such defendant, if the place of residence is stated in such affidavit; and the certificate of the clerk that he has sent such notice in pursuance of this section, shall be evidence of that fact."²

Where there is no personal service upon the defendant, the record must show affirmatively that the requirements of the statute, in regard to notice by publication, have been fulfilled.³

Default—Continuance for service, etc.—Sections 23 and 24 provide that

No default or proceeding shall be taken against any defendant not served with summons, unless he shall appear, until the expiration of ten days after the last publication as aforesaid.

¹ 1 Starr & Curtis 319; Rev. Stat. (1893), 172; Rev. Stat. (1895), 176.

² See *Pierce v. Carleton*, 12 Ill. 358; *Thormeyer v. Sisson*, 83 Ill. 188; *Lawver v. Langhans*, 85 Ill. 138; *Smith v. Clinton*, 13 Bradw. 572; *Haywood v. Collins*, 60 Ill. 328;

Dennison v. Taylor, 142 Ill. 45; *Baldwin v. Ferguson*, 35 Ill. App. 393; *Smith v. Huntoon*, 124 Ill. 24,

³ *Haywood v. McCrory*, 33 Ill. 459; *Lawver v. Langhans*, 85 Ill. 138; *Haywood v. Collins*, 60 Ill. 328.

"If for want of due publication or service, the cause is continued, the same proceedings shall be had, at a subsequent term of the court, as might have been had at the term at which the writ is returnable."¹

DEFENSES TO THE PROCEEDING.

The statute provides that "defendant may plead, traversing the facts stated in the affidavit upon which the attachment issued, which plea shall be verified by affidavit; and if, upon the trial thereof, the issue shall be found for the plaintiff, the defendant may plead or demur to the action as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons."²

No. 219. *Plea in abatement of the writ.*

In the ——— Court.

—— Term, 18—.

C. D.	}	<i>Attachment.</i>
<i>ats.</i>		
A. B.	}	And the defendant, by G. H., his attorney, comes and defends, etc, and prays judgment of the said writ, and that the same may be quashed, because he says that (<i>here traverse the allegations of the affidavit</i>). And of this the defendant puts himself upon the country, etc. ³

At common law, the filing of a plea in bar, before a plea in abatement was disposed of, was a waiver of a plea in abatement. But while this plea is called a plea in abatement, and for most purposes is governed by the rules applicable to such pleas, yet under such practice the issue presented by a plea to a writ of attachment is not waived by filing pleas in bar to the cause of action set forth in the declaration. They should all be submitted to the same jury.⁴

A plea in abatement of an attachment writ should conclude

¹Starr & Curtis, 320; Rev. Stat. (1883), 172; Rev. Stat. (1895), 176; *Firebaugh v. Hall*, 63 Ill. 81.

²See *Bates v. Jenkins*, Breese, 411; *Boggs v. Bindskoff*, 23 Ill. 67; *Lawrence v. Steadman*, 49 Ill. 270; see *Hawkins v. Albright*, 70 Ill. 88; *Schwabacher v. Rush*, 81 Ill. 310.

³See *Bates v. Jenkins*, Breese, 411; *White v. Wilson*, 5 Gilm. 21; *Walker v. Welsh*, 13 Ill. 674; *Eddy v. Brady*, 16 Ill. 306; *Pulliam v. Nelson*, 28 Ill. 113; *Hawkins v. Albright*, 70 Ill. 88.

⁴*Hawkins v. Albright*, 70 Ill. 88.

to the country, and issue is joined thereon by adding the common *similiter*.

The burden of proof is on the plaintiff to maintain the allegations of his affidavit; and if the finding on such issue is for the defendant, the writ is to be quashed.¹ It was formerly the practice, in such event, to abate the suit,² but the statute (the section last above quoted), now provides that the suit shall proceed to final judgment as though commenced by summons.

A plea which avers that the defendant was not a non-resident at the time the writ issued, is sufficiently certain, when it appears that the affidavit was made the same day the writ issued.³

Where an affidavit for attachment set out as ground therefor, that the defendant "has, within two years last past, fraudulently conveyed or assigned his property or effects, so as to hinder and delay his creditors," and the defendant pleaded in abatement that he "has not within two years last past fraudulently conveyed or assigned his property with intent to hinder and delay his creditors," the plea was, on demurrer, held to be bad because it failed to deny that the defendant had, within two years before the commencement of the suit, fraudulently disposed of his property.⁴

Practice and pleadings.—Section 26 provides that the practice and pleadings in attachment suits, except as otherwise provided by the statute in relation to attachments, are to conform, as nearly as may be, to the practice and pleadings in other suits at law.⁵

An attachment suit will not abate by the death of the sole defendant, but survives against his administrator.⁶

¹ *Ridgway v. Smith*, 17 Ill. 33; *Lawrence v. Steadman*, 49 Ill. 270; See *White v. Wilson*, 5 Gilm. 21; *Walker v. Welsh*, 13 Ill. 674; *Eddy v. Brady*, 16 Ill. 306; *Pulliam v. Nelson*, 28 Ill. 113; *Hawkins v. Albright*, 70 Ill. 88.

² *Lawrence v. Steadman*, 49 Ill. 270; see *Boggs v. Bindskoff*, 23 Ill. 67; *Bates v. Jenkins*, Breese, 411

³ *Parson v. Case*, 45 Ill. 296.

⁴ *McFarland v. Claypool*, 128 Ill. 397.

⁵ *Starr & Curtis* 320; Rev. Stat. (1893) 172; Rev. Stat. (1895) 176; see *Edwards v. Haring*, 59 Ill. App. 147; *Hecht v. Feldman*, 153 Ill. 390; *Bank v. Byram*, 131 Ill. 92.

⁶ *Dow v. Blake*, 148 Ill. 76; *Sharpe v. Morgan*, 144 Ill. 382.

A defendant may avail himself of any set-off properly pleadable by the laws of the state.¹

By simply appearing and pleading, a defendant can not have an attachment dissolved. This can only be effected by giving bond and security, as required by the statute.²

A defendant is not required to plead to the affidavit for an attachment in aid, until a term of the court commencing not less than ten days after the attachment is sued out;³ and the issue made by traversing the affidavit can not, without the plaintiff's consent, be tried before the first term of court at which the writ could properly be made returnable.⁴

Forthcoming bond, etc.—The statute provides (section 14) that “the officer serving the writ shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court, unless the person in whose possession the same is found, shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached, with condition that the said estate and property shall be forthcoming to answer the judgment of the court in said suit. The sheriff, or other officer, shall return such bond to the court in which the suit is brought, on the first day of the term to which the attachment is returnable.”⁵

Bond or recognizance to cover the judgment, etc.—The statute further provides (section 15) that “any defendant in attachment, desiring the return of property attached, may, at any time except in term time, at his option, instead of or in substitution for the bond required in the preceding section, give like bond and security, in a sum sufficient to cover the debt and damages sworn to in behalf of the plaintiff, with all interest, damages and costs of suit, conditioned that the defendant will pay the plaintiff the amount of the judgment and costs which may be rendered against him in that suit, on a final trial, within ninety days after such judgment shall be rendered. In term time, a recognizance, in substance as afore-said, may be taken in open court, and entered of record, in which case the court shall approve of the security and the re-

¹ 1 Starr & Curtis 323; Rev. Stat. (1893) 173; Rev. Stat. (1895) 177.

² *Martin v. Dryden*, 1 Gilm. 187; *Conn v. Caldwell*, 1 Gilm. 531.

³ *Crandall v. Birge*, 61 Ill. App. 234.

⁴ *Hecht v. Feldman*, 153 Ill. 390.

⁵ 1 Starr & Curtis 316; Rev. Stat. (1893) 171; Rev. Stat. (1895) 175; see *Williamson v. Hogan*, 46 Ill. 504; *Roberts v. Dunn*, 71 Ill. 46; *Turner v. Armstrong*, 9 Bradw. 24.

cognizance made to the plaintiff, and upon a forfeiture of such recognizance, judgment may be rendered and execution issued as in other cases of recognizance. In either case the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons."¹

The purpose and effect of giving a recognizance by the defendant in attachment, as provided in section 15 of the attachment act, is to enable the defendant to obtain control of the property attached or in the hands of garnishees, upon giving security for the payment of the judgment to be recovered in the attachment suit. Upon giving the bond or recognizance, the case proceeds *in personam*, and the judgment entered is a personal judgment, the recognizance standing as security for its payment.²

Interpleader by a third party, claiming the property attached.—Section 29 provides that "In all cases of attachment, any person, other than the defendant, claiming the property attached, may interplead, verifying his plea by affidavit, without giving bail, but the property attached shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of property; in all cases where the jury find for a claimant, such claimant shall be entitled to his costs; and where the jury find for the plaintiff in the attachment, such plaintiff shall recover his costs against such claimant. If such claimant is a non-resident of the state he shall file security for costs as in case of non-resident plaintiff."³

The right of interpleader extends to real as well as personal property attached.⁴ The interpleader should be interposed while the attachment suit is still *in fieri*, which is before

¹ Starr & Curtis 317; Rev. Stat. (1893) 171; Rev. Stat. (1895) 175; see *People v. Cameron*, 2 Gilm. 468; *Eimer v. Richards*, 25 Ill. 289; *Hill v. Harding*, 93 Ill. 77.

² *Sharpe v. Morgan*, 144 Ill. 382.

³ Starr & Curtis, 322; Rev. Stat. (1893), 173; Rev. Stat. (1895), 177; see *Purcell v. Steele*, 12 Ill. 93;

Ins. Co. v. Bank, 68 Ill. 348; *Meadowcroft v. Agnew*, 89 Ill. 469; *James v. Dexter*, 113 Ill. 654; *Ripley v. Bank*, 18 Bradw. 430; *Farwell v. Jenkins*, 18 Bradw. 491; *Juilliard v. May*, 130 Ill. 87.

⁴ *Bostwick v. Blake*, 145 Ill. 85; *Ducker v. Wear*, 145 Ill. 653.

or during the term at which final judgment is entered against the defendant in attachment.¹ If it is not filed in apt time the plaintiff should move to strike it from the files.² The only question under the interpleader is the title to the property in dispute, and upon this the burden of proof is on the interpleader.³

No. 220. Plea by a third person, claiming the property.

In the ——— Court.

— Term, 18—.

A. B. }
vs. } *Attachment.*

C. D. } And J. K., by L. M., his attorney, comes and interpleads, according to the form of the statute in such case made and provided, and says, that the goods and chattels (or “parcel of the goods and chattels, to wit,” describing them,) attached and seized by virtue of the said writ of attachment, in this behalf, were at the time the same were so attached and seized, and still are, the property of him, the said J. K., and not of the said C. D.: And this the said J. K. is ready to verify; wherefore he prays judgment if his said goods and chattels ought to be detained by virtue of the said writ, etc.

(Add affidavit, as under last precedent.)

ATTACHMENT IN AID OF SUIT.

Sections 31, 32 and 33 of the statute provide that “the plaintiff in any action of debt, covenant or trespass, or on the case upon promises, having commenced an action by summons or *capias*, may at any time pending such suit, and before judgment therein, on filing in the office of the clerk where such action is pending a sufficient bond and affidavit showing his right to an attachment under the first section of this act, sue out an attachment against the lands, goods, chattels, rights, moneys, credits and effects of the defendant, which said attachment shall be entitled in the suit pending, and be in aid thereof; and such proceedings shall be thereupon had as are required or permitted in original attachments, as near as may be:”⁴ *Provided*, this section shall not apply to actions in which the defendant has been arrested and has given special bail. *And provided further*, that in all actions of trespass, and trespass on the case, before a writ of attachment shall be issued,

¹ *Julliard v. May*, 130 Ill. 87.

Bank v. Newman, 55 Ill. App. 534;

² *Julliard v. May*, 130 Ill. 87.

Bostwick v. Blake, 145 Ill. 85.

³ *Marshall v. Cunningham*, 13 Ill.

⁴ *Schulenberg v. Farwell*, 84 Ill.

20; *Dexter v. Perkins*, 22 Ill. 143;

400; *Leopold v. Steele*, 41 Ill. App.

Merrick v. Davis, 65 Ill. 319; *Comm.*

17.

the plaintiff, his agent or attorney, shall apply to a judge of a court of record or a master in chancery of the county in which the suit is pending, and be examined, under oath, by such judge or master concerning the cause of the action; and thereupon such judge or master shall indorse upon the affidavit the amount of damages for which the writ shall issue, and no greater amount shall be claimed.

“In all cases when a *scire facias* shall be sued out of any court of this state, to make any person party to any judgment that has been or hereafter may be rendered therein, writs of attachment may be issued in aid thereof, against any one or all persons named in such *scire facias*, to any county of this state, upon the terms provided in this act; and the parties in such writs of attachment may be brought in by notice, as in other cases of attachment, when personal service can not be had.

“Upon the return of attachments issued in aid of actions pending, unless it shall appear that the defendant or defendants have been served with process in the original cause, notice of the pendency of the suit, and of the issue and levy of the attachment, shall be given as is required in cases of original attachment; and such notification shall be sufficient to entitle the plaintiff to judgment, and the right to proceed thereon against the property and estate attached, and against garnishees, in the same manner and with like effect as if the suit had been commenced by attachment.”

No. 221. *Affidavit for attachment in aid of action of assumpsit, debt or covenant.*

In the ——— Court.

A. B. }
 vs. } *Assumpsit.*
 C. D. } The said A. B., plaintiff, makes oath and says, that the said C. D., defendant, is indebted to him, the said A. B., in the sum of ——— dollars, (after allowing all just credits, deductions and set-offs,) for (*here set forth the nature of the debt*); and that the said C. D. (*here set forth one or more of the causes mentioned in the statute.*) And this affiant further says, that the place of residence of the said C. D. is ——— (or “is unknown to this affiant, and upon diligent inquiry he has not been able to ascertain the same”).

A. B.

Subscribed and sworn, etc.

¹ 1 Starr & Curtis 323-324; Rev. Stat. (1893) 173; Rev. Stat. (1895) 177; see *Beecher v. James*, 2 Scam. 462; *Ryder v. Glover*, 3 Scam. 548; *Dutcher v. Crowell*, 5 Gilm. 445; *Schulenberg v. Farwell*, 84 Ill. 400; *Roberts v. Dunn*, 71 Ill. 46; *Wasson v. Cone*, 86 Ill. 46.

When made by an agent or attorney, the affidavit should commence in this manner: "E. F., of, etc., makes oath and says that he is the agent (*or* 'attorney') in this behalf of the said A. B., plaintiff; and that the said C. D. is indebted to the said A. B.," etc.

No. 222. Affidavit for attachment in aid of action of trespass or case.

In the ——— Court.

A. B. }
vs. } *Trespass.*
 C. D. } The said A. B., plaintiff, makes oath and says, that (*here set forth the nature and cause of the action, with the substantial facts in relation thereto*). And this affiant further says that the amount of his damages can not be definitely stated, but he believes he has sustained damages in this behalf to the amount of ——— dollars. And this affiant further says that the said C. D. (*here set forth the cause for the attachment.*) And this affiant further says that the place of residence of the said C. D. is ——— (*or* "is unknown to this affiant, and upon diligent inquiry he has not been able to ascertain the same").

A. B.

Subscribed and sworn, etc.

See the remark under the last precedent.

The facts constituting the cause of action should be set forth substantially as in a declaration.

No. 223. Judge's or master's order, to be indorsed on the affidavit.

The affiant having been examined on oath, before me, concerning the cause of action within set forth, let the attachment issue for the sum of ——— dollars.

(*Date.*)

R. S., *Judge.*

To L. M., Clerk, etc.

Service.—Where the defendant is properly served in the original suit, no service is required in an attachment in aid.¹

Judgment when the defendant is not personally served, etc.—Section 35 provides that "when the defendant shall be notified as aforesaid," (by advertisement,) "but not served with process, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded upon to final judgment as in other cases of default, but in no case shall judgment be rendered against the defendant for a greater

¹ *Bailey v. Valley Bank*, 127 Ill. 332; *Rutledge v. Stribling*, 26 Ill. App. 353.

sum than appears, by the affidavit of the plaintiff, to have been due at the time of obtaining the attachment, with interest, damages and costs; and such judgment shall bind, and a special execution shall issue against the property, credits and effects attached, and no execution shall issue against any other property of the defendant; nor shall such judgment be any evidence of debt against the defendant in any subsequent suit.”¹

To give the court jurisdiction where there is no personal service, it is indispensable that the writ be either levied upon property or served upon garnishees having effects or credits in their possession belonging to the defendant.²

Sale of property on execution.—Section 36 provides that the property attached may be levied upon by execution issued in the attachment suit, whether in the hands of the officer or secured by bond as provided in this act, and shall be sold as other property levied upon by execution.³

Division of proceeds, etc.—Section 37 provides that “all judgments in attachments against the same defendant, returnable at the same term, and all judgments in suits by summons, *capias* or attachment against such defendant, recovered at that term or at the term when the judgment in the first attachment upon which judgment shall be recovered is rendered, shall share *pro rata*, according to the amount of the several judgments, in the proceeds of the property attached, either in the hands of a garnishee or otherwise: *Provided*, when the property is attached while the defendant is removing the same, or after the same has been removed, from the county, and the same is overtaken and returned, or while the same is secreted by the defendant, or put out of his hands, for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.”⁴

¹ 1 Starr & Curtis 324; Rev. Stat. (1893), 174; Rev. Stat. (1895), 178.

² *Clymore v. Williams*, 77 Ill. 618; *Borders v. Murphy*, 78 Ill. 81; *Martin v. Dryden*, 1 Gilm. 187; *Schorer v. Pettibone*, 58 Ill. App. 436; *Tennent v. Hargardin*, 58 Ill. App. 368.

³ See *Clymore v. Williams*, 77 Ill. 618.

⁴ 1 Starr & Curtis, 325; Rev. Stat.

(1893), 174; Rev. Stat. (1895), 178; see *Sav. Inst. v. Givens*, 82 Ill. 157; *Gregory v. Gover*, 19 Ill. 608; *Smith v. Bridge Co.*, 13 Bradw. 572; *Bank v. Bank Co.*, 114 Ill. 483; *Smith v. Reeve*, 113 Ill. 47; *Kennedy v. Wikoff*, 21 Ill. App. 277; *Donk v. Alexander*, 117 Ill. 330; *Locke v. Duncan*, 53 Ill. App. 373; *Everingham v. Bank*, 124 Ill. 527.

This section (37) does not apply to garnishee proceedings.¹

Division by the sheriff, etc.—Section 38 provides that “upon issuing executions against any property attached, the proceeds of which shall be required to be divided, the clerk shall, at the same time, make out and deliver to the sheriff, or other officer to whom the execution is issued, a statement of all judgments, with the costs thereon, which shall be entitled to share in such proceeds, and when any judgment creditor shall have been allowed a priority over the other judgment creditors, the same shall be stated. Upon the receipt of such proceeds by the sheriff or other officer, he shall divide and pay over the same to the several judgment creditors entitled to share in the same in the proportion they shall be entitled thereto.”²

Proceeds brought into court.—Section 39 provides that “the court may, at any time before the proceeds of any attached property has been paid over to the judgment creditors, order the whole or any part thereof to be paid into court, and may make any and all such orders concerning the same as it shall deem just.”³

GARNISHMENT.

The statute upon “Garnishment” (Sec. 1) provides that “whenever a judgment shall be rendered by any court of record, or any justice of the peace in this state, and an execution against the defendant in such judgment shall be returned by the proper officer, ‘No property found,’ on the affidavit of the plaintiff, or other credible person, being filed with the clerk of such court, or justice of the peace, that said defendant has no property within the knowledge of such affiant, in his possession, liable to execution, and that such affiant hath just reason to believe that any other person is indebted to such defendant, or hath any effects or estate of such defendant in his possession, custody or charge, it shall be lawful for such clerk or justice of the peace to issue a summons against the person supposed to be indebted to, or supposed to have any of the effects or estate of the said defendant, commanding him to appear before said court or justice, as a garnishee; and said court or justice of the peace shall examine and proceed against such

¹ *Kennedy v. Wikoff*, 21 Ill. App. 277.

² 1 Starr & Curtis 327; Rev. Stat. (1893), 174; Rev. Stat. (1895), 178; see *Chandler v. Mullanphy*, 2 Gilm. 464; *Heyer v. Alexander*, 108 Ill. 385; *Roofing Co. v. Macey*, 115 Ill. 390.

³ 1 Starr & Curtis 327; Rev. Stat. (1893), 174; Rev. Stat. (1895), 178; see *Brewster v. Riley*, 19 Bradw. 581; *Pollack v. Slack*, 92 Ill. 221; *Donk v. Alexander*, 117 Ill. 330.

garnishee or garnishees, in the same manner as is required by law against garnishees in original attachments.”¹

Only debts which the judgment debtor could recover by action at law can be reached by process of garnishment.²

No. 224. Affidavit for process of garnishment.

(*Venue and title of cause as in No. 220, ante, page 388.*)

A. B., the plaintiff in the above entitled cause, makes oath and says, that on, etc., he recovered a judgment in this court against the said C. D. for the sum of — dollars and costs of suit; that on, etc., an execution was issued on said judgment, and delivered to the sheriff of said county, it being the county in which the defendant then and still resides, to execute; that on, etc., said sheriff returned said execution “no property found;” affiant further states that the said C. D. has no property within the affiant’s knowledge, liable to execution; and affiant has just reason to believe that G. H. and J. K. are indebted to the said C. D., or have effects or estate of the said C. D. in their possession, custody or charge.

A. B.

Subscribed and sworn to, etc.

Service and return of summons.—Sections 2, 3 and 4, provide that “such garnishee summons, when issued by the clerk of a court of record, shall be made returnable, and be served as other summonses.

“No judgment by default shall be rendered unless such process shall have been served ten days before the return day; but if such process shall have been served within less than ten days, it shall be deemed returnable on the first day of the next term of the court. If garnishee process shall be issued in term time, it shall be made returnable on the first day of the next term of the court.

“If such process is issued by a justice of the peace, it shall be made returnable within the same time, and be served in the same manner as other summonses issued by justices of the peace.”³

Interrogatories and answers.—Section 5 provides that

¹ 1 Starr & Curtis 1217; Rev. Stat. (1893), 780; Rev. Stat. (1895), 829; see *R. R. Co. v. Reynolds*, 72 Ill. 487; *Pierce v. Wade*, 19 Bradw. 185; *Ins. Co. v. Connor*, 20 Bradw. 297.

² *Mining Co. v. Richardson*, 33 Ill. App. 280; *Richardson v. Lester*, 83 Ill. 55; *Netter v. Board*, 12 Ill. App. 607; *Webster v. Steele*, 75 Ill. 544;

Chatroop v. Borgard, 40 Ill. App. 279; *Joseph v. Krone*, 120 Ind. 495.

³ 1 Starr & Curtis 1220; Rev. Stat. (1893) 781; Rev. Stat. (1895) 830; see *Trans. Co. v. Schirmer*, 64 Ill. 106; *Ry. Co. v. Reynolds*, 72 Ill. 487; *Roofing Co. v. Macey*, 115 Ill. 390; *Ripley v. Bank*, 18 Bradw. 430.

"when any person is summoned as a garnishee upon any process of attachment or garnishee summons issued out of a court of record, the plaintiff shall, at or before the term at which the garnishee is bound to appear, or within such further time as the court shall allow, exhibit and file all and singular such allegations and interrogatories, in writing, upon which he shall be desirous to obtain and compel the answer of any and every garnishee, touching the lands, tenements, goods, chattels, moneys, choses in action, credits and effects of such defendant, and the value thereof, in his possession, custody or charge, or from him due and owing to the said defendant at the time of the service of the said writ, or at any time after, or which shall or may thereafter become due; and it shall be the duty of every garnishee to exhibit and file, under his oath or affirmation, within ten days after he shall be notified of the filing of such interrogatories, or if no notice of the filing of the same shall have been served upon him, then on or before the third day of the next succeeding term after the term at which such interrogatories are filed, full, direct and true answers to all and singular the allegations and interrogatories by the plaintiff so exhibited and filed; but in no case shall the garnishee be compelled to answer before the third day of the return term of the garnishee process."¹

Until interrogatories are filed, and an opportunity is afforded to the garnishee to answer them, and a conditional judgment taken, and a *scire facias* issued and served (or notice given), a final judgment can not be rendered.²

No. 225. Interrogatories to garnishees.

In the ——— Court.

—— Term, 18—.

A. B. }
vs. } *Assumpsit.*

C. D. } Interrogatories to be answered by G. H., J. K and N. O., respectively, as garnishees in this behalf :

1. Are you acquainted with the parties plaintiff and defendant in this cause?

2. Had you at or after the time of the service of process on you in this cause, or have you now, in your possession, custody or charge, any lands,

¹ Starr & Curtis 1221; Rev. Stat. (1893) 731; Rev. Stat. (1895) 830; see *Warne v. Kendall*, 78 Ill. 598; *Webster v. Steele*, 75 Ill. 544; *Laidlou v. Hatch*, 75 Ill. 11; *Dieter v. Smith*,

70 Ill. 168; *Wilcus v. Kling*, 87 Ill. 107.

² *Williams v. Van Meter*, 19 Ill. 293; *R. R. Co. v. Keohane*, 31 Ill. 144; *Cornell v. Payne*, 115 Ill. 63; *Bank v. M. S. Ass'n*, 20 Bradw. 133.

tenements, goods, chattels, moneys, choses in action, credits or effects of the said C. D.? If yea, set forth fully and particularly the kind, number, quantity and value thereof respectively.

3. Were you at or after the time of the service of such process on you, or are you now, in any manner indebted to the said C. D.? If yea, set forth fully and particularly for what, how, and to what amount you were or are so indebted to him.

(Add such interrogatories as the circumstances may require.)

E. F., Attorney for Plaintiff.

No. 226. Answer of garnishee.

In the ——— Court.

— Term 18—.

A. B. }
vs. } *Assumpsit.*

C. D. } The answers of G. H. to the interrogatories propounded to him, as garnishee in this behalf, by the said A. B., plaintiff :

1. To the first interrogatory, the said G. H. answering says, that (*here insert the matter of the answer*).

2. To the second interrogatory, the said G. H., answering says, that, etc.

(Answer all the interrogatories in succession and add affidavit as follows:)

In the ——— Court.

A. B. }
vs. } *Assumpsit.*

C. D. } G. H. makes oath and says, that the foregoing answers, by him made, are true in substance and in fact.

G. H.

Subscribed and sworn, etc.

If a private corporation is made a garnishee, it may answer by its proper officer or agent, but the answer must be under oath.¹

Plaintiff may contest the answer.—Section 7 provides that “when the plaintiff in any garnishee proceeding shall allege that any garnishee served with process, or appearing before any court, hath not truly discovered the lands, tenements, goods, chattels, moneys, choses in action, credits and effects, or if before a justice of the peace such personal effects of the defendant in the attachment suit or judgment, and the value thereof, in his possession, custody or charge, or from him due and owing to the defendant at the time of the service of the writ, or at any time after, or which shall or may thereafter become

¹ *Oliver v. R. R. Co.*, 17 Ill. 587; *Co. v. Macey*, 115 Ill. 390; *R. R. Co. Cornell v. Payne*, 115 Ill. 63; *Roofing v. Mason*, 11 Bradw. 525.

due, the court or justice of the peace shall immediately (unless the case shall for good cause be continued) proceed to try such cause, as against such garnishee, without the formality of pleading. The trial shall be conducted as other trials at law, and if the finding or verdict shall be against the garnishee, judgment shall be given against him in the same manner as if the facts had been admitted by him, with all costs of such trial. If the finding shall be in favor of the garnishee, he shall recover his costs against the plaintiff. And in case the garnishee admits indebtedness to the judgment debtor, he shall not be liable for costs."¹

The answer of a garnishee will be considered as true until it is contradicted or disproved.² It however only makes a case *prima facie* for the garnishee, and may be overcome by preponderating testimony.³ If it is vague and evasive it will be construed most strongly against the garnishee;⁴ but although it may not be strictly sufficient, it will prevail, unless exceptions are taken to it by demurrer or otherwise.⁵

A ground of defense proved by a garnishee will not avail, however just in itself, unless it is consistent with the allegations of his answer.⁶

Garnishee may deduct demands, etc.—Section 13 of the statute provides, that "every garnishee shall be allowed to retain or deduct out of the property, effects or credits in his hands all demands against the plaintiff, and all demands against the defendant, of which he could have availed himself if he had not been summoned as garnishee (whether the same are at the time due or not), and whether by way of set-off on a trial, or by the set-off of judgments or executions between himself and the plaintiff and defendant severally; and he shall be liable for the balance only after all mutual demands between himself and the plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries: *Provided*, that the

¹ Starr & Curtis, 1223; Rev. Stat. (1893) 781; Rev. Stat. (1895) 830; see *Ry. Co. v. Mason*, 11 Bradw. 525.

² *Pierce v. Carleton*, 12 Ill. 358; *McCoy v. Williams*, 1 Gilm. 584; *People v. Johnson*, 14 Ill. 342; see *Dieter v. Smith*, 70 Ill. 168; *Truitt v. Griffin*, 61 Ill. 26; *R. R. Co. v. Hindman*, 85 Ill. 521; *R. R. Co. v. Killenberg*, 82 Ill. 295; *Lashear v.*

White, 88 Ill. 43; *Rippen v. Schoen*, 92 Ill. 229.

³ *Kergin v. Dawson*, 1 Gilm. 86; *Schwab v. Gingerick*, 13 Ill. 697; *Pierce v. Carleton*, 12 Ill. 358; *Roofing Co. v. Macey*, 115 Ill. 390.

⁴ *Crain v. Gould*, 46 Ill. 293; *Ins. Co. v. Shimer*, 96 Ill. 580.

⁵ *I. C. R. R. Co. v. Cobb*, 48 Ill. 402.

⁶ *Church v. Hyde*, 40 Ill. 150.

verdict or finding, as well as the record of the judgment, shall show in all cases, against which party, and the amount thereof, any set-off shall be allowed, if any such shall be allowed.”¹

Where a garnishee charges himself with a sum of money, against which he claims a set-off, he must show the extent of his claim, or state facts from which the court can determine the amount. It would be a fraud upon creditors to permit a debtor to place his property beyond their reach, by depositing it with another person, to be held nominally for future services or advances.²

Other claimants of effects in the hands of garnishees.—

Sections 11 and 12 provide that “If it appears that any goods, chattels, choses in action, credits or effects in the hands of a garnishee are claimed by any other person, by force of an assignment from the defendant, or otherwise, the court or justice of the peace shall permit such claimant to appear and maintain his right. If he does not voluntarily appear, notice for that purpose shall be issued and served on him in such manner as the court or justice shall direct.

“If such claimant appears, he may be admitted as a party to the suit, so far as respects his title to the property in question, and may allege and prove any facts not stated or denied by the garnishee, and such allegations shall be tried and determined in the manner hereinbefore provided. If such person shall fail to appear after having been served with notice in the manner directed, he shall nevertheless be concluded by the judgment in regard to his claim.”³

Where property has been placed in the hands of a person to secure him against loss by reason of his becoming surety for another, such property is a pledge, and the person to whom it is pledged may retain it until his liability as a surety is extinguished.⁴ As between the parties, an assignment without notice by the assignee to the holder of the fund takes effect, and has precedence of a subsequent garnishment against the assignor.⁵

¹ 1 Starr & Curtis 1225; Rev. Stat. (1893) 782; Rev. Stat. (1895) 831; *Rankin v. Simonds*, 27 Ill. 352; *R. R. Co. v. R. R. Co.*, 1 Bradw. 399.

² *Craig v. Gould*, 46 Ill. 293.

³ 1 Starr & Curtis, 1225; Rev. Stat. (1893), 782; Rev. Stat. (1895), 831; see

Stevens v. Dillman, 86 Ill. 233; *Sheldon v. Hinton*, 6 Bradw. 216; *Ins. Co. v. Kennedy*, 57 Ill. App. 136; *Bank v. Newman*, 55 Ill. App. 534.

⁴ *Kergin v. Dawson*, 1 Gilm. 86; see *Dressor v. McCord*, 96 Ill. 389.

⁵ *Gregg v. Savage*, 51 Ill. App. 281;

A garnishee can not protect himself by merely answering that whatever debt he owes, or may owe, was assigned before the service of process on him. The good faith of the assignment must be made to appear. It seems that the alleged assignee may be required to appear, on notice given by the garnishee, and show that the transaction was genuine; and that if he should fail to do so, a judgment against the garnishee would be a defense to any suit brought against him by such assignee.¹

Garnishee may contest legality of proceeding.—A garnishee may inquire into the legality and regularity of the previous proceedings against the defendant in attachment, in order to show that they were unauthorized and void.² In respect to irregularities in the proceedings which amount to mere error in the controversy between the plaintiff and defendant in attachment, the garnishee has no right to complain for he will be protected in the payment of the judgment. But where the defect goes to the jurisdiction of the court to act in the premises, and the question is, whether or not the tribunal assuming to act has jurisdiction of the subject-matter or of the person of the defendant in attachment, the rule is otherwise. If the prior proceedings are void there is no sufficient basis to support a judgment against the garnishee, and he will not be protected in paying the same.³

What is subject to garnishment.—A debt which is uncertain and contingent and may never become due and payable is not subject to garnishment.⁴ It must be such as to be recoverable in an action of debt or *indebitatus* assumpsit.⁵ Equitable interests in choses in action can not be reached by process of garnishment;⁶ nor can there properly be such process

same case, 150 Ill. 161; *Horn v. Booth*, 22 Ill. App. 385.

¹ *Porn v. Staaden*, 24 Ill. 320; see *Crownover v. Bamberg*, 2 Bradw. 162; *Stevens v. Dillman*, 86 Ill. 233; *Ray v. Faulkner*, 73 Ill. 469.

² *Pierce v. Carleton*, 12 Ill. 358; see *Chanute v. Martin*, 25 Ill. 63; *Pierce v. Wade*, 19 Bradw. 185.

³ *Dennison v. Taylor*, 142 Ill. 45.

⁴ *Drake on Att.*, Sec. 551; *Ins. Co. v. Connor*, 20 Ill. App. 297.

⁵ *Capes v. Burgess*, 135 Ill. 61.

⁶ *May v. Baker*, 15 Ill. 89; see *Hodson v. McConnell*, 12 Ill. 170; *Snider v. Ridgway*, 49 Ill. 522.

against a debtor of a garnishee against whom an execution has been returned "no property."¹

As a general rule, money in the custody of the law, or in the hands of an officer of the law, is not subject to process of garnishment.² Thus, money in the hands of a sheriff, which has been made on execution, or received in redemption of land sold on execution;³ or money in the hands of a school-treasurer, and due to a school-teacher;⁴ or money in the hands of the clerk of a court,⁵ or an administrator,⁶ can not be reached by process of garnishment. But whenever the liability of an officer becomes changed, from an official to a personal one, he is amenable to this process;⁷ as where there is a surplus in a sheriff's hands, after satisfying an execution;⁸ or where a special master holds funds which have been ordered by the court to be paid to the debtor.⁹

A municipal corporation is not liable to the process of garnishment, no matter what may be the character of the debt, and where such a corporation is summoned as a garnishee, it may be discharged on mere motion, and without answer, at any time after process served.¹⁰ But a private corporation, unlike a municipal corporation, being created for private purpose, assumes the same duties and liabilities as a private individual.¹¹ The wages of a defendant, being the head of a

¹ *I. C. Co. v. Weaver*, 54 Ill. 319; *Harrell v. Whitman*, 19 Ala. 135; see *Wilcus v. Kling*, 87 Ill. 107.

² *Millison v. Fisk*, 43 Ill. 112; *Bivens v. Harper*, 59 Ill. 21; *Triebel v. Colburn*, 64 Ill. 376; *Smith v. Woolsey*, 22 Ill. App. 185.

³ *Pierce v. Carleton*, 12 Ill. 358; *Lightner v. Steinagel*, 33 Ill. 510; *Weaver v. Davis*, 47 Ill. 235; *Reddick v. Smith*, 3 Scam. 451; *Meadowcraft v. Agnew*, 89 Ill. 469.

⁴ *Millison v. Fisk*, 43 Ill. 112; *Ross v. Allen*, 10 N. H. 96; *Bivens v. Harper*, 59 Ill. 21.

⁵ *Drane v. McGarock*, 7 Humph. 132; *Smith v. Finlen*, 23 Ill. App. 156.

⁶ *Curling v. Hyde*, 10 Missouri,

374; *Crownover v. Bamberg*, 2 Bradw. 162; *Brooks v. Cook*, 8 Mass. 246; see *Bartell v. Bauman*, 12 Bradw. 450.

⁷ *Weaver v. Davis*, 47 Ill. 235; *Lightner v. Steinagel*, 33 Ill. 510; *Millison v. Fisk*, 43 Ill. 112; *Pierce v. Carleton*, 12 Ill. 358.

⁸ *Pierce v. Carleton*, 12 Ill. 358; *Bartell v. Bauman*, 12 Bradw. 450.

⁹ *Weaver v. Davis*, 47 Ill. 235.

¹⁰ *Merwin v. Chicago*, 45 Ill. 133; *Chicago v. Hasley*, 25 Ill. 595; *Triebel v. Colburn*, 64 Ill. 376; *Bartell v. Bauman*, 12 Bradw. 450; *R. R. Co. v. R. R. Co.*, 1 Bradw. 399. *Fast v. Wolf*, 38 Ill. App. 27.

¹¹ *Merwin v. Chicago*, 45 Ill. 133;

family, to an amount not exceeding fifty dollars, is exempt from garnishment.¹

Paragraph 34 of the garnishment act provides that whenever, in any proceedings in any court of this state to subject the wages due to any person to garnishment, it shall appear that such person is a non-resident of the State of Illinois, that the wages earned by him were earned and payable outside of the state of Illinois, the said person, whose wages were so sought to be subjected to garnishment, shall be allowed the same exemption as is at the time allowed to him by the laws of the State in which he so resides.²

Section 15 of the statute provides that no person shall be liable as a garnishee by reason of having drawn, accepted, made or indorsed any negotiable instrument, when the same is not due, in the hands of the defendant at the time of service of the garnishee summons or the rendition of the judgment.³

A stockholder in an incorporated company, who owes the company unpaid stock, upon which a call has been made and notice given, is liable to be garnisheed on a judgment recovered against the company.⁴

A non-resident creditor may proceed by attachment against a non-resident debtor, and garnishee a resident debtor or foreign corporation doing business in this state.⁵ A debt due in another state may be attached in Illinois, where the garnishee is a resident of the state, under the statute providing that a creditor may have an attachment against a non-resident debtor.⁶

A corporation, by establishing an agency and doing busi-

Roche v. Ass'n, 2 Bradw. 360; *Ry. Co. v. R. R. Co.*, 81 Ill. 534.

¹ Rev. Stat. (1895), 832; Rev. Stat. (1893), 783; *Starr & Curtis* 1225; see *Bliss v. Smith*, 78 Ill. 359; *Hoffman v. Fitzwilliam*, 81 Ill. 521; *Fanning v. Bank*, 76 Ill. 53; *R. R. Co. v. Mason*, 11 Bradw. 525.

² Rev. Stat. (1895) 834; see *Railroad v. Dougan*, 142 Ill. 248; *R. R. Co. v. Barron*, 83 Ill. 365.

³ 1 *Starr & Curtis* 1226; Rev.

Stat. (1895), 832; Rev. Stat. (1893), 783; *Warne v. Kendall*, 78 Ill. 598.

⁴ *Meints v. Mill Co.*, 89 Ill. 48; see *Gasch v. Boat Co.*, 59 Ill. App. 391; *Robertson v. Moeninger*, 20 Ill. App. 227.

⁵ *R. R. Co. v. Dougan*, 41 Ill. App. 543; *R. R. Co. v. Flannigan*, 47 Ill. App. 322; *Line Co. v. Collier*, 148 Ill. 259.

⁶ *Pomeroy v. Rand*, 157 Ill. 176.

ness in this state, becomes a resident and is liable as a garnishee of its non-resident creditors.¹

Unliquidated damages are not liable to garnishment.²

A party can not be charged as garnishee in respect to promissory notes or other evidences of indebtedness, which at the time of the service of garnishee process and during the pendency of the suit, are in another state.³

Non-resident garnishee.—Section 9 provides that “If any garnishee shall become a non-resident, or shall have gone out of this state, or is concealed within this state so that the *scire facias* can not be served upon him, upon the plaintiff or his agent filing affidavit, as in cases of non-resident defendants in attachment, such garnishee may be notified in the same manner as such non-resident defendants, and upon such notice being given, he may be proceeded against in the same manner as if he had been personally served with such *scire facias*.”⁴

Conditional judgment.—Section 8 provides that “When any person shall have been summoned as a garnishee upon any attachment or other writ issued out of any court of record, or by any justice of the peace, and shall fail to appear or make discovery, as by this act required, the court or justice of the peace may enter a conditional judgment against such garnishee for the amount of the plaintiff’s demand, or judgment against the original defendant, and thereupon a *scire facias* shall issue against such garnishee, returnable, if the proceedings be in a court of record, at the next term of court, or if it be before a justice of the peace, within the same time as other summonses from justices of the peace, commanding such garnishee to show cause why such judgment should not be made final. If such garnishee, being served with process or notified as required by law, shall fail to appear and make discovery in the manner aforesaid, the court, or justice of the peace, shall confirm such judgment, to the amount of the judgment against the original defendant, and award execution for the same and costs. If such garnishee shall appear and answer, the same proceedings may be had as in other cases.”⁵

Final judgment.—Section 10 provides that “No final judg-

¹ *Roche v. Ins. Co.*, 2 Bradw. 270;
Grover v. Wells, 40 Ill. App. 350;
Henderson v. Schaas, 35 Ill. App.
155.

² *Copes v. Burgess*, 135 Ill. 61.

³ *Bowen v. Pope*, 125 Ill. 28.

⁴ Rev. Stat. (1893) 782; Rev. Stat. (1895) 831; Starr & Curtis 1224.

⁵ See *Webster v. Steele*, 75 Ill. 544;
Ry. Co. v. Reynolds, 72 Ill. 487;
Horat v. Jackel, 59 Ill. 139; *R. R. Co.*
v. Hindman, 85 Ill. 521.

ment shall be entered against a garnishee in any attachment proceeding until the plaintiff shall have recovered a judgment against the defendant in such attachment.”¹

In a case where service had been had on the garnishee, a conditional judgment rendered, interrogatories filed, a *scire facias* served, and, the garnishee failing to answer, final judgment was rendered, it was held that it was discretionary in the court to set aside the judgment, and a refusal to do so could not be assigned for error.²

The proper practice, in respect to garnishees, is to enter a judgment against the garnishee, in favor of the defendant in the attachment or execution for the full amount due, for the benefit of such attaching and judgment creditors as are entitled to share in the proceeds. If the judgment exceeds what is due to such creditors, the excess will be for the benefit of the defendant in the attachment or execution.³

Death of garnishee—Representative made party.—Section 18 provides that “In case of the death of a person served as garnishee, his executor or administrator may be made a party, and notified, unless his appearance is entered, as in the case of the death of a defendant, and the cause may proceed against him as personal representative of the deceased.”⁴

Effect of judgment against garnishee.—Sections 16 and 17 provide that “The judgment against a garnishee shall acquit him from all demands by the defendant for all goods, effects and credits paid, delivered or accounted for by the garnishee by force of such judgment.

“If the person summoned as garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant for the same demand.”⁵

When debt is not due, execution stayed.—Section 19 provides that “When judgment is rendered against any garnishee, and it shall appear that the debt from him to the defendant

¹ Rev. Stat. (1893), 782; 1 Starr & Curtis 1225; Rev. Stat. (1895) 831; see *Brickey v. Davis*, 9 Bradw. 362; *Crandall v. Birge*, 61 Ill. App. 231.

² *Ex. Co. v. Bedbury*, 34 Ill. 459.

³ *Kern v. Brewery*, 140 Ill. 371; *Stahl v. Webster*, 11 Ill. 511; *Gilliland v. Nixon*, 26 Ill. 50; *Webster v. Steele*, 75 Ill. 544; *Warne v. Kendall*, 78 Ill. 598; *Stevens v. Dillman*, 86

Ill. 233; *Ry. Co. v. Mason*, 11 Bradw. 525; *Boddie v. Mfg. Co.*, 51 Ill. App. 302.

⁴ 1 Starr & Curtis 1226; Rev. Stat. (1893) 783; Rev. Stat. (1895) 832; *Winkler v. Barthel*, 6 Bradw. 111.

⁵ See *Allen v. Watt*, 79 Ill. 284; *Sanburg v. Papeneau*, 81 Ill. 446; see *Kennedy v. Wikoff*, 21 Ill. App. 277.

is not yet due, execution shall not issue against him until twenty days after the same shall become due, unless the party asking the same, or his agent, shall make oath that he believes the debt will be lost unless execution issue forthwith, in which case execution shall issue as soon as said debt to defendant is due; but no sale of property, under such execution, shall take place until after the expiration of twenty days from date of judgment."¹

Lack of space prevents the insertion of the remaining sections of the attachment act, for which the pleader is referred to the statute.

ATTACHMENT OF WATER CRAFTS.

For what liens given.—The statute of Illinois² provides (§ 1) "That every sail vessel, steamboat, steam dredge, tug boat, scow, canal boat, barge, lighter, and other water craft of above five tons burthen, used, or intended to be used in navigating the waters or canals of this state, or used in trade and commerce between ports and places within this state, or having their home port in this state, shall be subject to a lien thereon, which lien shall extend to the tackle, apparel and furniture of such craft as follows:

First. For all debts contracted by the owner or part owner, master, clerk, steward, agent or shipshusband of such craft, on account of supplies and provisions furnished for the use of such water craft, on account of work done or services rendered on board of such craft by any seaman, master or other employe thereof, or on account of work done or materials furnished by mechanics, tradesmen or others, in and about the building, repairing, fitting, furnishing or equipping such craft.

Second. For all sums due for wharfage, anchorage or dock hire, including the use of dry docks.

Third. For sums due for towage, labor at pumping out or raising, when sunk or disabled, and to shipshusband or agent of such water craft for disbursements due by the owner on account of such water craft.

Fourth. For all damages arising for the non-performance of any contract of affreightment or of any contract touching the transportation of property entered into by the master, owner, agent or consignee of such water craft, where any such contract is made in this state.

¹ 1 Starr & Curtis 1226; Rev. Stat. (1893) 832; Rev. Stat. (1893) 783; *Bartell v. Bauman*, 12 Bradw. 451.

² Rev. Stat. (1895) 179; 1 Starr & Curtis 334; Rev. Stat. (1893) 177;

Knisely v. Parker, 34 Ill. 481; *R. R. Co. v. Crane*, 102 Ill. 249; *Johnson v. P. E. Co.*, 105 Ill. 462; *Langdon v. Wilcox*, 107 Ill. 606; see *City v. Schooner*, 17 Ill. App. 203.

Fifth. For all damages arising from injuries done to persons or property by such water craft, whether the same are aboard said vessel or not, where the same shall have occurred through the negligence or misconduct of the owner, agent, master or employe thereon, but said craft shall not be liable for any injury or damage received by one of the crew from another member of the crew."

Lien on goods for freight.—The statute (§ 2) gives a lien upon the goods, etc., shipped upon any such water craft for sums due for freight, advanced charges and demurrage, which may be collected by attachment.

(§ 3.) **Limitation.**—The lien may be enforced at any time within five years; *provided*, no creditor shall be allowed to enforce such lien as against, or to the prejudice of any other creditor or subsequent incumbrancer, or *bona fide* purchaser, unless the lien is enforced within nine months.

Petition, bond, etc.—Section 4 provides that "the person claiming to have a lien may file with the clerk of any court of record of competent jurisdiction in the county where any such water craft may be found, a petition setting forth the nature of his claim, the amount due, after allowing all payments and just offsets, the name of the water craft, the name and residence of each owner known to the petitioner; and when any owner or his place of residence is not known to the petitioner, he shall so state, and that he has made inquiry and is unable to ascertain the same; which petition shall be verified by affidavit of the petitioner or his agent or attorney. If the claim is upon an account or instrument in writing, a copy of the same shall be attached to the petition."

*No. 227. Petition for an attachment against a water craft.*¹

In the ——— Court.

—— Term, A. D. 18—.

To the Honorable ——— Court of the county of ———, in the State of Illinois:
The petitioner, A. B., of, etc., respectfully represents—

That C. D., who resides at, etc. (*giving the residence*), is the owner of a certain water craft of above five tons burthen, called the "———," that he is justly indebted to the petitioner in the sum of ——— dollars, after allowing all just credits, deductions and set-offs, on account of, etc. (*here insert the nature of the claim*); for which the petitioner claims a lien upon such water craft, pursuant to the provisions of the statute of this state. He therefore prays for an attachment of such water craft.

A. B.

¹ See *Schooner v. Woodworth*, 1 Scam. 511; *Mulligan v. Buck*, 55 Ill. 425; *Norway v. Jansen*, 52 Ill. 373.

STATE OF ILLINOIS,)
 County of ———, } ss.

A. B., on oath states, that the foregoing petition by him subscribed, is true in substance and in fact.

A. B.

Subscribed and sworn, etc.

If the owner or his place of residence is not known to the petitioner, and he has been unable, upon inquiry, to ascertain the same, the following form may be sufficient:

No. 228. Petition for attachment against a water craft where the name of the owner is unknown.

(Title of court, and address, as in last precedent.)

The petitioner, A. B., of, etc., respectfully represents—

That he performed services as an engineer on board of a water craft (of above five tons burthen), named the "*Water Witch*," from the — day of —, 18—, until the — day of —, 18—; *(or stating any other claim;)* for which he is justly entitled to the sum of — dollars, after allowing all just credits, deductions and setoffs; that the name of the owner or owners of such water craft, or his or their place of residence is or are unknown to the petitioner; that he has made inquiry and is unable to ascertain the same. That the petitioner claims a lien upon said water craft, and prays for an attachment of such water craft, in pursuance of the statute of this state.

A. B.

(Add affidavit.)

The petitioner, or his agent or attorney, is required to file with the petition a bond in at least double the amount of the claim, as required by the statute.

The sixth section of the statute provides for the issuing of attachment. The seventh section prescribes the form of the writ, and the eighth section directs how the writ shall be executed and returned.

Section 9 provides that whenever any such writ shall be issued and served, no other attachment shall issue against the said water craft, unless the first attachment is discharged, or the vessel is bonded.

Notice by publication.—(§ 10.) "Upon return being made to such writ, unless the vessel has been bonded, as hereinafter provided, the clerk shall immediately cause notice to be given, in the same manner as required in other cases of attachment."¹ The notice shall contain, in addition to that required in other cases of attachment, a notice to all persons to intervene

¹ See page —, *ante*.

for their interests on a day certain, or that said claim will be heard *ex parte*.

Intervening creditors.—Section 11 provides that “any person having a lien upon or any interest in the water craft attached, may intervene to protect such interest, by filing a petition as hereinbefore provided, entitled an intervening petition; and any person interested may be made a defendant at the request of himself, or any party to the suit, and may defend any petition by filing an answer as hereinafter provided, and giving security satisfactory to the court, to pay any costs arising from such defense; and upon the filing of any intervening petition, a summons, as hereinafter provided, shall issue; and if the same shall be returned not served, notice by publication may be given as aforesaid; and several intervening petitioners may be united with each other, or the original, in one notice.”

By section 12, an intervening petitioner is required to file a bond, as in case of an original attachment. Section 13 provides that intervening petitions may be filed at any time before the vessel is bonded, or if not bonded, before order of distribution. And by section 14, all liens which shall not be filed before sale under decree or judgment, shall cease.

Bonding vessel.—Under section 15, the owner, or his agent or attorney, or any person interested in the craft, desiring a return thereof, by giving proper notice, etc., may bond said vessel and have the same returned.

Appraisement—Restitution—Sale.—The owner, etc., may have the vessel appraised under section 16, and by depositing the appraised value, or giving bond, may have restitution, and if such claimant shall decline any such application, or neglect within twenty days to accept the appraisement and make deposit, or give bond, or if the property seized shall be liable to decay, depreciation or injury from delay, the court may order the same sold, and the proceeds brought into court to abide the event of the suit.

By section 17, the clerk is required, upon receiving a bond or deposit, to issue an order of restitution, and under the 18th section additional security may be required from the claimant, if that already given is insufficient, etc., upon proper showing and notice. And the court is authorized to enforce all orders made in reference thereto by attachment for contempt, etc.

Answer—Affidavit of merits—Default.—Section 19 pro-

vides that "Within three days after the return day of such summons—if personally served ten days before the first day of the term to which it is returnable, or if not personally served, then within the time prescribed in the published notice—the owner or any person interested adversely to the claims mentioned in the notice, unless on cause shown further time shall be allowed by the court, shall except, demur, or file his answer upon oath or affirmation. The answer shall be full and distinct to each allegation of the petition, but such answer shall not have the effect of a sworn answer in chancery as evidence. At the time of filing an exception, demurrer or answer, an affidavit of the claimant, or his agent or attorney, shall be filed, stating that the claimant has a good defense upon the merits. And in case no such exception, demurrer or answer, together with such affidavit of merits, be filed within the time above specified, the petitioner shall be entitled to a default, and the demand may be proved and judgment rendered as in other cases."

Amendments.—(§ 20.) Amendments are allowed as in other cases.

Judgments—Order of sale.—Sections 21 and 22 provide the manner in which judgments shall be rendered; sections 23 and 24 for an order of sale and the proceedings thereon; and section 25 for the making of a bill of sale and what it shall recite, and its effect as evidence.

Distribution.—Sections 26, 27 and 28 relate to the distribution of the money realized by the proceeding:

1st, to pay all costs; 2d, to pay seaman's wages due upon the last two voyages, or if shipped by the month, the last two months; and 3d, all other claims filed prior to the order of distribution on which decree of judgment has been rendered in favor of complainants, together with whatever balance may be due seamen. The disposition of any surplus or remnants is provided for.

As to the constitutionality of the statute, see the authorities noted below.¹

Jurisdiction of state and federal courts.—The jurisdiction of the United States district courts on the lakes and nav-

¹ *The Moses Taylor*, 4 Wall. 411; *Steamboat v. Phoebus*, 11 Pet. 175; *Hine v. Trevor*, 4 Wall. 555; *Williamson v. Hogan*, 46 Ill. 504; *Steamboat v. Jefferson*, 10 Wheat. 428; *Jackson v. Steamboat*, 20 How. 296; *Johnson v. Elevator*, 119 U. S. 388.

igable waters connecting the same, is governed by the act of congress of February 3, 1845, and is not exclusive, but is concurrent with such remedies as may be given by the state laws. A maritime lien does not arise on a contract for materials and supplies furnished to a vessel in her home port; and in respect to such contracts, it is competent for the state legislatures to create such liens as they may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations for their enforcement. The proceedings by attachment given by the statutes of Illinois against water crafts to enforce liens as provided, have no resemblance to libels in the courts of admiralty, but are of the same character as ordinary suits in attachment.¹

Prior liens.—An attaching or judgment creditor can not acquire any interest or right in the property seized, against the interests of a *bona fide* lien holder, such lien being prior in time to the levy of the attachment or rendition of the judgment. A prior mortgage on a water craft, duly recorded, has precedence of a lien of a material-man or an employe, subsequently acquired.²

¹ *Tug Boat Dorr v. Waldron*, 62 Ill. 221; *Montauk v. Walker*, 47 Ill. 335; *Williamson v. Hogan*, 46 Ill. 504; *The Belfast*, 7 Wall. 624; *Gr. West v. Oberndorf*, 57 Ill. 168; *Johnson v. Elevator*, 119 U. S. 388.

² *Hilton v. Miller*, 62 Ill. 230; *Tug Boat Dorr v. Waldron*, 62 Ill. 221; *Gr. West v. Oberndorf*, 57 Ill. 168; see *Gindele v. Corrigan*, 129 Ill. 582; same case, 28 Ill. App. 476.

CHAPTER XII.

EJECTMENT.

The action of ejectment is the one commonly used to try the title to real property. Originally an action of trespass, and personal, it has been greatly modified, partly by judicial contrivance, and partly, in later times, by statutes; and it is now a mixed action, for the recovery of land and damages, the latter, however, being usually merely nominal. Its history is curious, and well worthy of study, as affording perhaps the most remarkable instance of the adaptation of form to new exigencies to be found in the English law. A lucid exposition of the origin of the action, and of the modifications it had undergone up to his time, is given in Blackstone's Commentaries.¹

In Illinois, ejectment is said to be, under the statute regulating it, a real action, and not, even technically, an action for a tort; and it is held that the death of a sole defendant does not abate the suit.² It is also held, however, that where the statute is silent, the practice and rules of the common law are to govern.³

When the action lies, etc.—The general rule is, that ejectment will lie only for real property, as land, or something annexed to land, upon which an entry might in fact be made, and of which the sheriff could deliver actual possession.⁴ It is therefore not in general sustainable for property which in legal contemplation is not tangible, as for common in gross, or other incorporeal hereditament, or for a water-course—though it

¹ 2 Bla. Com. 198, 205; see 1 Chit. Pl. 187, 196; 2 Greenl. Ev., Sec. 303, 337.

² *Guyer v. Wookey*, 18 Ill. 536.

³ *Williams v. Brunton*, 3 Gilm.

⁴ Adams Eject. 16; *Jackson v. May*, 16 Johns. 184; *Black v. Hepburne*, 2 Yeates 331; *Den v. Craig*, 3 Green. 192.

will lie for the ground over which the water passes.¹ Nor can the action be sustained for a movable chattel, such as a stall.²

With respect to the title, a person having the right of entry, whether his title is in fee, for life, or for years, may support an action of ejectment, but the right of possession must be of some duration, and exclusive, and therefore ejectment can not be supported where one has merely a license to use land, etc.³

If one tenant in common evicts his co-tenant, ejectment may be sustained by the latter,⁴ but in such case it must be shown that the defendant actually ousted the plaintiff, or did some other act amounting to a total denial of his right.⁵

After breach of the condition of a mortgage the mortgagee may maintain ejectment.⁶ And he may do so before breach, as it is held by the English courts, and in Illinois, and some other states of the Union;⁷ though the contrary doctrine is held by some courts.⁸

The mortgagee may maintain ejectment to recover the mortgaged property, proceed in chancery to foreclose the equity of redemption, and sue at law to recover the amount of the debt, and he may have all these actions at the same time.⁹

Where a person enters into possession of premises under a purchase, and fails to comply with the terms of the contract of

¹ *Chancellor v. Thomas*, Yelv. 143; *Adams Eject.* 18, 20.

² See 1 Chit. Pl. 187, *et seq.*

³ 1 Chit. Pl. 189; *Goodtitle v. Wilson*, 11 East 345; *King v. Mellor*, 2 East 190.

⁴ *Johnson v. Swain*, Busb. 335; *Lessee v. Sayre*, 2 Ohio 110; *Valentine v. Northrop*, 12 Wend. 494; *Shaver v. McGraw*, 12 Wend. 562; *Barnitz v. Casey*, 7 Cranch 456; see *Lundy v. Lundy*, 131 Ill. 138.

⁵ Rev. Stat. (1893) 618; Rev. Stat. (1895) 666; *Starr & Curtis* 987; 1 Chit. Pl. 191; *Lundy v. Lundy*, 131 Ill. 138.

⁶ *Lessee v. McGuire*, 2 Ohio 223; *Carroll v. Ballance*, 26 Ill. 9; *Delehay v. Clement*, 3 Scam. 201; *Van Sant v. Allmon*, 23 Ill. 30; *Rolland*

v. Fischer, 30 Ill. 224; *Pollock v. Miason*, 41 Ill. 516; *Speer v. Had-duck*, 31 Ill. 439; *Oldham v. Pfleger*, 84 Ill. 102; *Fisher v. Milmine*, 94 Ill. 328; *Finlon v. Clark*, 118 Ill. 32; *Taylor v. Adams*, 115 Ill. 570; *Esker v. Hefferman*, 159 Ill. 38; see *McGinnis v. Fernandes*, 126 Ill. 228.

⁷ *Carroll v. Ballance*, 26 Ill. 9, and cases there cited; see *Kilgour v. Gockley*, 83 Ill. 109; *Barrett v. Hinckley*, 124 Ill. 32.

⁸ *Jackson v. Myers*, 11 Wend. 533; *Jackson v. Bronson*, 19 Johns. 325; *Wilson v. Troup*, 2 Cow. 145.

⁹ *Delehay v. Clement*, 3 Scam. 201; *Van Sant v. Allmon*, 23 Ill. 30; *Carroll v. Ballance*, 26 Ill. 9; *Holston v. Needles*, 115 Ill. 461.

purchase, the vendor may treat the contract as rescinded and regain the possession by this action,¹ but not until after notice to quit, or a demand of possession,² unless there has been some act or omission on the part of the purchaser which amounts to a repudiation of the contract.³

Title necessary to sustain.—An equitable title will not sustain ejectment,⁴ nor will it avail as a defense against the legal title.⁵ In ejectment legal title only can be tried, and the plaintiff can not recover unless he shows a legal right to the property as contradistinguished from an equitable right.⁶

While as a general rule, the legal title must prevail in actions at law, ejectment can not be maintained against one in the lawful and rightful possession of land.⁷ The action of ejectment proceeds for the possession of the premises, claiming that they have been unlawfully entered upon and unjustly withheld. When the defendant's possession is rightful, and the plaintiff is not wrongfully kept out of possession, the action can not be maintained.⁸ If ejectment be brought by one claiming under a mortgagor of the premises against the mortgagee in possession, or one holding under him as tenant, the mortgage will constitute a complete defense to the action, for the reason that ejectment can not be maintained against one lawfully in possession.⁹

In this action, the plaintiff must show himself entitled to the possession on the day laid in the declaration; a deed made

¹ *Dean v. Comstock*, 32 Ill. 173; *Kibben v. Newell*, 41 Ill. 461; see *R. Co. v. Hay*, 119 Ill. 493.

² *Prentiss v. Wilson*, 14 Ill. 91; *Higgins v. Highfield*, 13 East 407; see *Stow v. Russell*, 36 Ill. 18.

³ *Prentiss v. Wilson*, 14 Ill. 91; see *Wood v. Morton*, 11 Ill. 547.

⁴ *Finlon v. Clark*, 118 Ill. 32; *Fleming v. Carter*, 70 Ill. 286; *Joy v. Berdell*, 25 Ill. 537; *Franklin v. Palmer*, 50 Ill. 202; *Roundtree v. Little*, 54 Ill. 323; *Aholz v. Zellar*, 88 Ill. 24; *People v. Force*, 100 Ill. 549; *DeWitt v. Bradbury*, 94 Ill.

446; *Barrett v. Hinckley*, 124 Ill. 32; *Sontag v. Bigelow*, 142 Ill. 143.

⁵ *Chiniquy v. Cath. Bish.*, 41 Ill. 148; *Wales v. Bouge*, 31 Ill. 468; see *Johnson v. Watson*, 87 Ill. 535; *Kirkpatrick v. Clark*, 132 Ill. 342.

⁶ *Walton v. Follansbee*, 131 Ill. 147; *Barrett v. Hinckley*, 124 Ill. 32; see *Sands v. Wacaser*, 149 Ill. 530; *Church v. Church*, 138 Ill. 608.

⁷ *Sands v. Wacaser*, 149 Ill. 530.

⁸ *Sands v. Wacaser*, 149 Ill. 530.

⁹ *Fountain v. Bookstover*, 141 Ill. 461.

after that time can not aid him.¹ And he must rely on the strength of his own title, and not on the weakness of that of the defendant.² Proof of prior possession under claim of ownership is *prima facie* evidence of ownership and seizin, and is sufficient to authorize a recovery, unless the defendant shall show a better title.³

A legal subsisting title outstanding in a third person, will defeat a recovery;⁴ but a mortgage, even after condition broken, does not constitute an absolute outstanding title, of which a stranger can take advantage.⁵

A mere trespasser who takes forcible possession of land without title will not be allowed to set up an outstanding title.⁶

It is held that, under the statute of Illinois, a conveyance made by the plaintiff during the pendency of the suit does not affect his right of recovery; and that in such case the benefit of the recovery inures to his grantee.⁷ And a person entering under the defendant, pending the suit, takes the land subject to whatever judgment may be rendered; but where a landlord has resumed possession, pending a suit in ejectment against his tenant, and the landlord has received no notice of the suit,

¹ *Wood v. Morton*, 11 Ill. 547; *Pitkin v. Yaw*, 13 Ill. 251; *Kilgour v. Gockley*, 83 Ill. 109; see *Joy v. Berdell*, 25 Ill. 537; *Mills v. Graves*, 44 Ill. 50; *Sands v. Kagay*, 150 Ill. 109.

² *Boyer v. Thornberg*, 115 Ill. 540; *Marshall v. Barr*, 35 Ill. 106; *Stuart v. Dutton*, 39 Ill. 91; *Hague v. Porter*, 45 Ill. 318; *Cobb v. Lavalle*, 89 Ill. 331; *Vallette v. Bennett*, 69 Ill. 632; *Stumpf v. Osterhage*, 94 Ill. 115; *Mester v. Houser*, 94 Ill. 433; *Kirby v. Ry. Co.*, 109 Ill. 412; *Sidwell v. Schumacher*, 99 Ill. 426; *Agnew v. Perry*, 120 Ill. 656; *Whitford v. Drexel*, 118 Ill. 602; *Village v. Goodwin*, 128 Ill. 57; see *Park v. Gavin*, 139 Ill. 280; *Kirkpatrick v. Clark*, 132 Ill. 345; *Walton v. Follansbee*, 131 Ill. 156.

³ *Burger v. Hobbs*, 67 Ill. 592;

Benefield v. Albert, 132 Ill. 665; *Anderson v. McCormick*, 129 Ill. 308; *Harland v. Eastman*, 119 Ill. 22.

⁴ *Masterson v. Cheek*, 23 Ill. 72; *Hulick v. Schovill*, 4 Gilm. 159; *Rupert v. Mark*, 15 Ill. 540; *Stuart v. Dutton*, 39 Ill. 91; *Oetgen v. Ross*, 54 Ill. 79; *Cobb v. Lavalle*, 89 Ill. 331; *Clark v. Day*, 93 Ill. 480; *Kirkland v. Cox*, 94 Ill. 400; *Whitford v. Drexel*, 118 Ill. 600; *Walton v. Follansbee*, 131 Ill. 147.

⁵ *Hall v. Lance*, 25 Ill. 277; *Fisher v. Milmine*, 94 Ill. 328; *Holbrook v. Debo*, 99 Ill. 372; *Barrett v. Hinckley*, 124 Ill. 32.

⁶ *Anderson v. Gray*, 134 Ill. 550.

⁷ *Mills v. Graves*, 44 Ill. 50; *Johnson v. Shinkle*, 50 Ill. 137; *Holbrook v. Debo*, 99 Ill. 372.

and is chargeable with no fault or *laches*, he will not be evicted by a writ of possession issued on a judgment against the tenant, but the writ will, on motion, be stayed, and the landlord let in to defend the existing suit on the merits.¹

The statute of Illinois in force July 1, 1872, provides that the action of ejectment may be brought in the cases theretofore accustomed, subject to the provisions of the act; and that it may also be brought in the same cases in which a writ of right may be brought by law, to recover lands, tenements or hereditaments, and by any person claiming an estate therein, in fee, for life or for years, either as heir, devisee or purchaser.²

By landlord against tenant.—In regard to the action of ejectment by a landlord against his tenant for non-payment of rent, the statute of Illinois concerning landlord and tenant provides as follows: "In all cases between landlord and tenant, where one-half year's rent shall be in arrear and unpaid, and the landlord or lessor to whom such rent is due has right by law to re-enter for non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, commence an action of ejectment for the recovery of the demised premises. And in case judgment be given for the plaintiff in such action of ejectment, and the writ of possession be executed thereon before the rent in arrear and costs of suit be paid, then the lease of such lands shall cease and be determined, unless such lessee shall, by writ of error, reverse the said judgment, or shall, by bill filed in chancery within six months after the rendition of such judgment, obtain relief from the same: Provided, that any such tenant may, at any time before final judgment on said ejectment, pay or tender to the landlord or lessor of the premises the amount of the rent in arrear, and costs of suit, and the proceedings on such ejectment shall thereupon be discontinued."³

Who may maintain the action.—The statute of Illinois

¹ *Oetgen v. Ross*, 54 Ill. 79; *Lowe v. Emerson*, 48 Ill. 160; see *Hanson v. Armstrong*, 22 Ill. 442; *Williams v. Brunton*, 3 Gilm. 600.

² 1 Starr & Curtis, 980; Rev. Stat. (1893) 616; Rev. Stat. (1895) 664.

³ 2 Starr & Curtis, 1492; Rev. Stat. (1893) 920; Rev. Stat. (1895) 976; *Eberlien v. Abel*, 10 Bradw. 626; *Whitford v. Drexel*, 118 Ill. 600; *Harland v. Eastman*, 119 Ill. 22.

concerning ejectment, provides that no person shall recover in this action unless he has, at the time of the commencement of the suit, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.¹

This statute further provides that any two or more persons claiming the same premises as joint tenants, tenants in common or co-parceners, may join in a suit for the recovery thereof, or any one may sue alone for his share.²

A party can not maintain ejectment based upon a parol partition, as the plaintiff must recover on a legal title, and can not upon an equitable title.³

The corporate authorities of a city may maintain ejectment against an intruder upon the public streets.⁴

Against whom to be brought, etc.—The statute of Illinois, above mentioned, further provides, that if the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the suit, and all other persons claiming title or interest to or in the same, may also be joined as defendants. If the premises are not occupied, the action is to be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.⁵

The statute also provides that "if the action is against several, and the plaintiff is entitled to recover, he shall recover against all who are in joint possession or claim the title, whether they shall have pleaded separately or jointly." And further, that "when the action is against several defendants, if it appear on the trial that any of them occupy distinct parcels in severalty or jointly, the plaintiff shall elect, at the

¹ 1 Starr & Curtis 980; Rev. Stat. (1893) 616; Rev. Stat. (1895) 664; *Mills v. Graves*, 44 Ill. 50; see *Wood v. Morton*, 11 Ill. 547; *Pitkin v. Yaw*, 13 Ill. 251; *Joy v. Berdell*, 25 Ill. 537.

² 1 Starr & Curtis 981; Rev. Stat. (1893) 617; Rev. Stat. (1895) 665; see

1 Chit. Pl. 62-65; *Cone v. Coleman*, 108 Ill. 591.

³ *Sontag v. Bigelow*, 142 Ill. 143.

⁴ *Chicago v. Wright*, 69 Ill. 318.

⁵ 1 Starr & Curtis 981, 982; Rev. Stat. (1893) 617; Rev. Stat. (1895) 665; *Dickerson v. Hendrix*, 88 Ill. 66; *Park v. Gavin*, 139 Ill. 280.

trial, against which he will proceed; which election shall be made before the testimony in the cause shall be deemed to be closed; and the suit shall be dismissed as to the defendants not so proceeded against.¹

It is not necessary, in ejectment, to make any other person than the occupant a defendant. A recovery against him binds all persons in privity.² But a person in possession merely as a servant or employe of the person claiming an adverse title, is not an occupant within the meaning of the statute.³

Suit against tenant by other than landlord.—The same statute, sections 17 and 18, further provides that every tenant who shall at any time be sued in ejectment, by any person other than his landlord, shall forthwith give notice thereof to his landlord, or to his agent or attorney, under the penalty of forfeiting two years' rent of the premises in question, or the value thereof, to be recovered by such landlord by action of debt, in any court having cognizance thereof. The landlord whose tenant is sued in ejectment, may, upon his own motion or that of the plaintiff, be made defendant in such action, upon such terms as may be ordered by the court.⁴

The landlord may appear and defend in the name of the tenant, if he will indemnify him against costs; and the name of the landlord may be entered on the record as defendant instead of the tenant;⁵ but it has been held that the landlord could not be allowed to substitute his own name as defendant, in place of that of the tenant, without the plaintiff's consent.⁶

A judgment in ejectment against a tenant in possession is conclusive upon the landlord, if the latter interposed in aid of the tenant in the defense, or if the landlord had notice of the

¹ 1 Starr & Curtis 987; Rev. Stat. (1893) 618; Rev. Stat. (1895) 666.

² *Hanson v. Armstrong*, 22 Ill. 442.

³ *Chiniquy v. Bishop*, 41 Ill. 148; *Hawkins v. Reichert*, 28 Cal. 535. But see 1 Chit. Pl. 191.

⁴ 1 Starr & Curtis 984; Rev. Stat. (1893), 618; Rev. Stat. (1895), 666; *Stribling v. Prettyman*, 57 Ill. 371;

Thomsen v. McCormick, 136 Ill. 135.

⁵ *Thompson v. Schuyler*, 2 Gilm. 271; *Williams v. Bruntton*, 3 Gilm. 600; see Starr & Curtis 984; Rev. Stat. (1893), 618; Rev. Stat. (1895), 666.

⁶ *Merritt v. Thompson*, 13 Ill. 716; *Jackson v. Stager*, 1 Cowan 134.

pendency of the suit, and full opportunity of making a defense thereto.¹

COMMENCEMENT OF THE ACTION.

In Illinois, the action of ejectment is commenced by the issuing of a summons, which is of like form with, and tested, served and returned in the same manner as summonses in other actions at law.²

The declaration.—The time for filing the declaration in ejectment, under the present statute of Illinois, is the same as in other actions at law, that is to say, ten days before the term to which the summons is made returnable, etc.³

The statute further provides, in regard to the declaration, as follows: "It shall be sufficient for the plaintiff to aver in his declaration, that (on some day therein to be specified, and which shall be after his title accrued) he was possessed of the premises in question (describing them as hereinafter provided), and being so possessed thereof, that the defendant afterwards (on some day to be stated) entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage any nominal sum the plaintiff shall think proper to state."⁴

"The premises so claimed shall be described in such declaration with convenient certainty, so that, from such description, possession of the premises claimed may be delivered. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration. But the plaintiff, in any case, may recover such part, share or interest in the premises as he shall appear on the trial to be entitled to."⁵

"In every case, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such life or the duration of such term. The declaration may contain several

¹ *Thomsen v. McCormick*, 136 Ill. 135; see *Park v. Gavin*, 139 Ill. 280.

² Rev. Stat. (1893), 617; Rev. Stat. (1895), 665; 1 Starr & Curtis 982.

³ *Ib.*

⁴ See *Park v. Gavin*, 139 Ill. 280.

⁵ See Wat. Ad. Eject., 233; *Almond v. Bonnell*, 76 Ill. 536; *Com. v. Coleman*, 108 Ill. 591.

counts, and several parties may be named as plaintiffs, jointly in one count and separately in others."¹

The demise of the plaintiff should not be alleged as of a date prior to his having acquired the title.²

As the action of ejectment is local, it must appear from the declaration that the land is situate in the county where the suit is brought, or there will be a want of jurisdiction in the court.³

No. 229. Declaration in ejectment.

In the — Circuit Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of —. } sct. A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of ejectment: For that the plaintiff, on the — day of —, in the year 18 —, was possessed of a certain parcel of land, with the appurtenances, lying in the county aforesaid, to wit, (*here describe the land;*) which said tenements the plaintiff claims *in fee*: And the plaintiff being so thereof possessed, the defendant afterwards, to wit, on etc., entered into the said tenements, and now unlawfully withholds from the plaintiff the possession thereof; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

If the declaration or count is for an undivided interest, say, "was possessed of the one undivided *half* part of a certain parcel of land," etc. And if a less estate than the fee is claimed, say "which said tenements the plaintiff claims for the term of his life," or "for the term of the life of one J. K., who is still living," or "for the term of — years from the — day of —," etc.

No. 230. Declaration by several persons, naming them as plaintiffs jointly in one count and separately in others.

(*Title of court, etc.*) A. B., G. H. and J. K., plaintiffs, by E. F. their attorney, complain of C. D. defendant, of a plea of ejectment: For that the plaintiffs, on, etc., were possessed of a certain parcel of land, with the ap-

¹ 1 Starr & Curtis 983; Rev. Stat. (1893), 617; Rev. Stat. (1895), 665; *Rawlins v. Bailey*, 15 Ill. 178; *Rupert v. Mark*, 15 Ill. 540; *Ballance v. Rawkin*, 12 Ill. 420; *Murphy v. Orr*, 32 Ill. 489; *Deininger v. McConnell*, 41 Ill. 228; *Clark v. Thomp-*

son, 47 Ill. 25; *Hardin v. Kirk*, 49 Ill. 153.

² *Schoonmaker v. Doolittle*, 118 Ill. 605.

³ *Minkhart v. Hankler*, 19 Ill. 47; *Stark v. Ratcliff*, 111 Ill. 81.

purtenances, lying in the county aforesaid, to wit, (*here describe the land*;) which said tenements the plaintiffs claim in fee: And the plaintiffs being so thereof possessed, the defendant afterwards, to wit, on, etc., entered into the said tenements, and now unlawfully withholds from the plaintiffs the possession of the same.

(*Second count.*) And also for that the said A. B., on, etc., was possessed of *the one undivided third part* of a certain other parcel of land, with the appurtenances, lying in the county aforesaid, to wit, (*here describe the land*;) which last mentioned tenements the said A. B. claims in fee: And he being so thereof possessed, the defendant afterwards, to wit, on, etc., entered into the last mentioned tenements, and now unlawfully withholds from the said A. B. the possession of the same.

(*Third count.*) And also for that the said G. H., on, etc., was possessed (*and so on as in the second count, substituting G. H. for A. B. throughout.*)

(*Fourth count.*) And also for that the said J. K., on, etc., was possessed (*and so on as in the second count, substituting J. K. for A. B. throughout.*)

(*Conclusion.*) Wherefore the plaintiffs say that they are injured, and have sustained damage to the amount of — dollars, and therefore they bring suit, etc.

See the section of the statute above quoted, allowing several counts, by different plaintiffs. Before the fiction of a nominal plaintiff was abolished, the declaration might include several counts, on the demises of different persons.¹

The 27th section of the Illinois ejectment act provides that "it shall not be an objection to a recovery, in any action of ejectment, that any one of several plaintiffs do not prove any interest in the premises claimed, but those entitled shall have judgment, according to their rights, for the whole or such part or portion as he or they might have recovered if he or they had sued in his or their name or names only."²

DEFENSES TO THE ACTION.

The statute of Illinois, sections 19 and 21, provides as follows: "The defendant may demur to the declaration, as in personal actions, or he shall plead the general issue, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration, and the filing of such plea or demurrer shall be deemed

¹ 1 Chit. Pl. (11 Am. Ed.), 187.

(1893) 618; Rev. Stat. (1895), 666; see

² 1 Starr & Curtis 987; Rev. Stat.

Walton v. Follansbee, 131 Ill. 147.

an appearance in the cause, and upon such plea the defendant may give in evidence any matter that may tend to defeat the plaintiff's action, except as hereinafter provided. The plea of not guilty shall not put in issue the possession of the premises by the defendant, or that he claims title or interest in the premises."¹ The plea for which the statute provides only purports to deny the unlawful *withholding* of the premises.

The action of ejectment proceeds upon the theory of an unlawful entry and unjust detention.²

In the absence of any statute on the subject the real plaintiff must prove, on the general issue, first, that he had the *legal estate* in the premises at the time of the demise laid in the declaration; second, that he also had the right of entry; and third, that the defendant, or some one claiming under him, was in *possession* of the premises at the time when the suit was commenced.³

A judgment in an action of forcible entry and detainer can not be pleaded as a bar to an action of ejectment, for the reason that the questions involved in the two proceedings are different. The question of title can not be inquired into in forcible entry and detainer, and if it could, a judgment therein would be no bar, without proof that the question of title was raised and decided.⁴

No. 231. Plea—not guilty.

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } *Ejectment.*

A. B. } And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of unlawfully withholding the tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiff has above thereof complained against him: And of this the defendant puts himself upon the country, etc.

¹ *Sheldon v. Van Vleck*, 106 Ill. 45; *Wieland v. Kobick*, 110 Ill. 16; *Roosevelt v. Hungate*, 110 Ill. 595; *Stubblefield v. Borders*, 92 Ill. 279; *R. R. Co. v. Sawyer*, 92 Ill. 377; *R. R. Co. v. Hardt*, 138 Ill. 120.

² *R. R. Co. v. Karnes*, 101 Ill. 402;

Sands v. Kagey, 150 Ill. 109; *Sands v. Wacaser*, 149 Ill. 530.

³ 2 Greenl. Ev., Sec. 304; Tilling. Ad. Eject., 247.

⁴ *Riverside Co. v. Townshend*, 120 Ill. 9.

The plea of not guilty admits the possession of the entire premises claimed in the declaration.¹

The statute of Illinois (section 22) further provides that "it shall not be necessary for the plaintiff to prove that the defendant was in possession of the premises, or claims title or interest therein, at the time of bringing the suit, or that the plaintiff demanded the possession of the premises, unless the defendant shall deny that he was in such possession, or claims title or interest therein, or that demand of possession was made, by special plea, verified by affidavit."²

Section 22 of the ejectment act is intended to apply to the different cases as they may arise. If the suit is brought to recover possession under the first clause, the defendant may deny possession, and thereby defeat the action, unless possession is shown. If persons are made parties defendant who are not in possession, upon the basis that they are claiming title or interest in the premises, they may put in issue that fact, the same as if the suit was brought to recover vacant land under section 7 of the statute. In the latter case, a plea denying possession presents an immaterial issue.³

In ejectment, to recover the possession of a lot, the defendant may defeat a recovery by showing that the plaintiff's deed was made to him for the purpose of hindering, delaying and defrauding the creditors of the defendant, or for any other illegal purpose.⁴

Claim for mesne profits.—On this subject, the statute of Illinois provides as follows: "Instead of the action of trespass for mesne profits, the plaintiff seeking to recover such damages, shall, within one year after the entering of the judgment, make and file a suggestion of such claim, which shall be entered, with the proceedings thereon, upon the record of such judgment, or be attached thereto, as a continuation of the same.

¹ *Ry. Co. v. Hardt*, 138 Ill. 120.

² 1 Starr & Curtis, 986; Rev. Stat. (1893), 618; Rev. Stat. (1895), 666; *Murphy v. Williamson*, 85 Ill. 149; *Dickerson v. Hendryx*, 88 Ill. 66; *Wieland v. Kobick*, 110 Ill. 16;

Brandish v. Grant, 119 Ill. 606; see *Park v. Gavin*, 139 Ill. 280; *Ry. Co. v. Hardt*, 138 Ill. 120; *Timmons v. Kidwell*, 138 Ill. 13.

³ *Park v. Gavin*, 139 Ill. 280.

⁴ *Kirkpatrick v. Clark*, 132 Ill. 342.

"Such suggestion shall be substantially in the same form as is now in use for a declaration in an action of assumpsit for use and occupation, and the same rules of pleading thereto shall be observed as upon declarations in personal actions."¹

No. 232. Suggestion of claim for mesne profits.

In the ——— Court.

—Term, 18—.

A. B. } *Ejectment. Claim for mesne profits.*
 vs. }
 C. D. } And now on this——day of, etc., comes the plaintiff, by E. F., his attorney; and, according to the form of the statute in such case made and provided, suggests to the court here, that the defendant, on, etc., in etc., was indebted to the plaintiff in the sum of — dollars, for the use and occupation of the tenements above in the said declaration and judgment mentioned, by the defendant held, used and occupied, at his request, for a long space of time before then elapsed; and being so indebted, the defendant, in consideration thereof, on the day last aforesaid there promised the plaintiff to pay him the said sum of money, on request: Yet the defendant, though requested, has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, etc.

Upon the filing of such suggestion, the defendant is to be summoned in the same manner as in an original action.²

As between the successful plaintiff in an action of ejectment and the evicted defendant or his tenant, growing crops are a part of the realty, and belong to the plaintiff, and the fact that he may have his action for mesne profits will not impair his right of ownership therein.³

Defenses to the claim for mesne profits, etc.—The statute above mentioned further provides as follows: "The defendant may plead the general issue of *non assumpsit*, and, under such plea, may give notice of, or may plead specially, any matter in bar of such claim, except such as were or might have been controverted in such action of ejectment; but he may plead or give notice of a recovery by such defendant, or any other person, of the same premises, or of part thereof, subsequent to

¹ 1 Starr & Curtis 992; Rev. Stat. (1893) 620; Rev. Stat. (1895) 668; (1893) 620; Rev. Stat. (1895) 668; *Tucker v. Hamilton*, 108 Ill. 464.
Ringhouse v. Keener, 63 Ill. 230. ³ *McGinnis v. Fernandes*, 135 Ill.

² 1 Starr & Curtis 992; Rev. Stat. 69.

the verdict in such action of ejectment, in bar or in mitigation of the damages claimed by the plaintiff.

“If any issue of fact be joined on such suggestion, it shall be tried as in other cases; and if such issue be found for the plaintiff, the same jury shall assess his damages to the amount of the *mesne* profits received by the defendant since he entered into possession of the premises, subject to the restrictions hereinafter contained.

“On the trial of such issue, the plaintiff shall be required to establish, and the defendant may controvert, the time when such defendant entered into the possession of the premises, the time during which he enjoyed the *mesne* profits thereof, and the value of such profits; and the record of the recovery in the action of ejectment shall not be evidence of such time. On such trial, the defendant shall have the same right to set off any improvements made on the premises, to the amount of the plaintiff’s claim, as is now or shall hereafter be allowed by law; and in estimating the plaintiff’s damages, the value of the use by the defendant of any improvements made by him shall not be allowed to the plaintiff.”¹

No. 233. *Plea of non assumpsit, to suggestion of claim for mesne profits.*

In the ——— Court.

—— Term, 18——.

C. D. }
ats. } *Ejectment. Claim for mesne profits.*

A. B. } And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that he did not promise in manner and form as the plaintiff has above in his said suggestion in that behalf alleged against him: And of this the defendant puts himself upon the country, etc.

For a form of notice of special matter, and forms of special pleas, see the precedents in assumpsit, *ante*, chapter IV.

New trial—Under the statute.—The statute allows a new trial at any time within one year after judgment, either upon default, or verdict in the action of ejectment, upon payment of costs; and the party against whom it is rendered shall be entitled to have the judgment vacated and a new trial granted

¹ 1 Starr & Curtis 992; Rev. Stat. (1893) 621; Rev. Stat. (1895) 669.

in the cause.¹ The statute only applies to judgments in the circuit court, and does not authorize the vacation of a final judgment of an appellate court.²

A first new trial under the statute is the right of an unsuccessful party on a compliance with the statute, without showing cause. The court has no discretion to refuse or allow it.³

Where a plaintiff in ejectment, after a judgment against him, obtains a new trial under the statute, and by amendment makes a new party defendant, and before his second trial dismisses his suit, the former judgment is no bar to a second action brought by him against such new defendant. The effect of the new trial is to vacate and render wholly inoperative the prior judgment, and leaves the parties as they stood before the trial, except that the plaintiff can not claim a second new trial under the statute, in the same suit.⁴

The right of a party to a new trial in ejectment, under the statute, depends upon his payment of all the costs.

An order granting a new trial in ejectment, under the statute, upon the payment of the costs, is interlocutory, and not final; and when the costs are not paid within the year, the court may, at a succeeding term, vacate such order and strike the case from the docket.

On a motion to vacate an order for a new trial in ejectment, granted under the statute, for the failure of the party to pay the costs, no other evidence on the question is necessary than the records of the court.⁵

After the expiration of the term at which a new trial in ejectment has been awarded under the statute, the order for the new trial will become conclusive, and the court will have no power to set such order aside, even though all the costs have not been paid.⁶

¹ 1 Starr & Curtis 989; Rev. Stat. (1893) 619; Rev. Stat. (1895) 667; see *Chamberlin v. McCarty*, 63 Ill. 262; *Pugh v. Reat*, 107 Ill. 440; *Murphy v. Riemenschneider*, 104 Ill. 520; *County v. Dock Co.*, 131 Ill. 505; *Aholz v. Durfee*, 21 Ill. App. 144.

² *Lowe v. Foulke*, 103 Ill. 58.

³ *Vance v. Schuyler*, 1 Gilm. 160;

Riggs v. Savage, 4 Gilm. 129; *Emmons v. Bishop*, 14 Ill. 152; *Shackelford v. Bailey*, 35 Ill. 387; *Chamberlin v. McCarty*, 63 Ill. 262; *Lowe v. Foulke*, 103 Ill. 58.

⁴ *Sheldon v. Van Vleck*, 106 Ill. 45; *Edwards v. Edwards*, 22 Ill. 121.

⁵ *Setzke v. Setzke*, 121 Ill. 30.

⁶ *County v. Dock Co.*, 131 Ill. 505.

Revival of judgment.—A judgment in ejectment, by analogy to other judgments, becomes dormant after the lapse of seven years, and can only be executed after that time by being revived by *scire facias*. After the lapse of seven years the court has no power to issue a writ of possession without a revival of the judgment.¹

Common source of title.—Section 25 of the ejectment act provides: "If the plaintiff, or his agent or attorney, will state, on oath, upon the trial, that he claims title through a common source with the defendant, it shall be sufficient for him to show title from such common source, unless the defendant, or his agent or attorney, will deny, on oath, that he claims title through such source, or will swear that he claims title through some other source."²

Where the plaintiff in ejectment shows that both parties claim title through a common source, and the defendant denies, under oath, that he claims title under such source, or swears "that he claims title through some other source," this will impose on the plaintiff the burden of going back of the common source and tracing his title from the United States.³

The defendant's response to the plaintiff's oath that both parties claim under a common source, must be under oath, and, whether made by written affidavit or in the form of an oral statement at the trial, is in the nature of a pleading and is to be taken and construed most strongly against him.⁴

The proceedings in the action of ejectment, in Illinois and in most of the other states, are in a great measure regulated by statute, and it is not deemed necessary to occupy much space with the subject in this work. For a full understanding of the nature of the action, and the general principles of law governing it, the text books, where the subject is specially treated, as well as the statute, should be consulted.⁵

¹ *Wilson v. Trustees*, 138 Ill. 285; *Bowar v. Ry. Co.*, 136 Ill. 108. For form of *scire facias* to revive judgment in ejectment see No. 298 *post*.

² 1 Starr & Curtis 987; Rev. Stat. (1893), 618; Rev. Stat. (1895), 666; see *Smith v. Loatsch*, 114 Ill. 273,

³ *R. R. Co. v. Hardt*, 138 Ill. 120; *Smith v. Loatsch*, 114 Ill. 273.

⁴ *Ibid*.

⁵ See Adams on Eject.; 2 Cooley's Blackstone, 198-206; 2 Greenl. Ev., Secs. 303-337.

CHAPTER XIII.

DEBT.

When the action lies, etc.—The action of debt lies to recover money due upon simple contracts, express or implied, whether verbal or written; upon contracts under seal, or of record; and upon legal liabilities.¹

A joint action of debt lies against two persons who have bound themselves by the same writing to pay a sum of money, the one with and the other without seal.²

It lies on statutes, by a party aggrieved,³ or by a common informer; and whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty.⁴

On simple contracts and legal liabilities, debt lies for money lent, paid, had and received, and due on an account stated; for interest due, for work and labor, for fees, for goods sold, and for use and occupation;⁵ and it is laid down as a general rule, that debt lies upon every contract in deed or in law.⁶

Debt lies upon simple contracts wherever *indebitatus assumpsit* will lie, and is a concurrent remedy therewith;⁷ and it may be supported on a *quantum meruit*.⁸

¹ 1 Chit. Pl. 97; *Republica v. La-coze*, 2 Dall. 123; *Kelly v. Davis*, 1 Hend. (Tenn.) 71; *Crocket v. Moore*, 3 Sneed (Tenn.) 145.

² *Oldham v. Hunt*, 4 Humph. 332; *Butcher v. Carile*, 12 Gratt. (Va.) 520.

³ See *Cushing v. Dill*, 2 Scam. 461.

⁴ 1 Chit. Pl. 98; *U. S. v. Colt*, 1 Peters (C. C.) 147; *Thomas v. Allen*, 1 Hill 145; *Sims v. Anderson*, 8 Leigh 479; *Home v. Semple*, 3 McLean 150; *Mayor v. Butler*, 1 Barb. 325; *Hoy v. Hoy*, 44 Ill. 469.

⁵ 1 Chit. Pl. 98; *Davis v. Shoemaker*, 1 Rawl. 135; *McKean v. Whitney*, 3 Denio 452; *Collins v. Johnson*, 1 Hemp. 279.

⁶ 1 Chit. Pl. 110; *Elder v. Rouse*, 15 Wend. 220.

⁷ *Bedell v. Janney*, 4 Gilm. 193; *U. S. v. Colt*, 1 Peters (C. C.) 145; *Smith v. Lowell*, 8 Pick. 178; *Larmon v. Carpenter*, 70 Ill. 549.

⁸ *Smith v. Lowell*, 8 Pick. 178; *Van Deusen v. Bloom*, 18 Pick. 229; *Thompson v. French*, 10 Yerg. 452; 1 Chit. Pl. 97.

The action also lies to recover money due on any specialty, or contract under seal to pay money, as on single bonds, on charter parties, on policies of insurance under seal; and on bonds conditioned for the payment of money, or the performance of any other act;¹ on leases, for rent or penalties; on mortgage deeds, and on annuity deeds.² Where, however, a gross sum is payable by installments, debt will not lie until the last installment falls due;³ though for rent payable quarterly, or otherwise, or for an annuity, or on a stipulation to pay a certain sum on one day and the like sum on another, debt lies on each default; and even where one sum is payable by installments, if the payment is secured by a penalty, debt is sustainable for such penalty on such default.⁴

The statute on administration, in Illinois, authorizes several successive suits on an executor's or administrator's bond, for the use of any person or persons injured, until the whole penalty shall be recovered.⁵ Debt is the proper form of action for a violation of an ordinance of an incorporated town.⁶

It lies upon a bond made to a coroner in an action of replevin.⁷ It always lies on a judgment of a court of record, and may be brought although the plaintiff, at the time of bringing the suit, may be entitled to an execution on his judgment.⁸

An action of debt may be brought on an appeal bond by the appellee, the moment judgment is rendered in the cause appealed, unless the money is paid immediately.⁹ Where the property of another has been taken and converted, the tort may be waived, and assumpsit or debt brought for its value.¹⁰

¹ 1 Chit. Pl. 99; see *Adam v. Arnold*, 86 Ill. 185.

² 1 Chit. Pl. 99; *Hoy v. Hoy*, 44 Ill. 469.

³ 1 Chit. Pl. 102; *Hoy v. Hoy*, 44 Ill. 469.

⁴ 1 Chit. Pl. 102; *Spark v. Gari- gius*, 1 Binn. 152.

⁵ Rev. Stat. (1895), 113; 1 Starr & Curtis 203; *People v. Randolph*, 24 Ill. 324; Rev. Stat. (1893), 113.

⁶ *Town v. Block*, 36 Ill. 507.

⁷ *Manning v. Pierce*, 2 Scam. 6; see *Speer v. Skinner*, 35 Ill. 282.

⁸ *Greathouse v. Smith*, 3 Scam. 541; *Ry. Co. v. Miller*, 43 Ill. 199; *Ames v. Hoy*, 12 Cal. 11; *Smith v. Stevens*, 133 Ill. 183.

⁹ *Gregory v. Stark*, 3 Scam. 611.

¹⁰ *Alsbrook v. Hathaway*, 3 Sneed (Tenn.) 454; see *Bull v. Pratt*, 1 Conn. 347; *Reed v. Renselaer*, 3 Cow. 393.

Where one party takes undue advantage of another, and compels him to pay money contrary to equity and good conscience, he may recover it again in an action of debt.¹

It lies on a decree in chancery which has the effect of a judgment at law,² such as a decree for a sum of money as alimony,³ or a decree fixing the balance of an account between the parties;⁴ though there is some conflict of authorities on this question.⁵ It may be maintained on a decree of a foreign court which finds a sum of money to be due, and directs its payment; but not on a decree for the performance of acts other than the payment of money.⁶

Debt lies on the judgment of a justice of the peace of another state.⁷

It has been held that this action may be maintained by the assignee against the maker of a promissory note;⁸ but in *Hilborn v. Artus*, 3 Scam. 344, a doubt was expressed whether this can be done.

An action of debt lies upon an instrument under seal for the payment of a sum certain, to a specified person, and at a certain time, without alleging or proving the consideration for which, or the transaction in which, the instrument was made, although it contains a statement or explanation of such consideration or transaction. Such statement does not change the character of the instrument.⁹

Debt lies also on an award for the payment of money,¹⁰ and that without regard to the penalty of the bond;¹¹ and on by-laws, for fines and amercements.¹² Debt can not be sustained in

¹ *County v. Simmons*, 5 Gilm. 513.

² *Williams v. Preston*, J. J. Marsh. 600; *Elliott v. Ray*, 2 Blackf. 31.

³ *Howard v. Howard*, 15 Mass. 196; see *Elliott v. Ray*, 2 Blackf. 31; *Trimble v. State*, 4 Blackf. 42; *Dow v. Blake*, 148 Ill. 76.

⁴ *Thrall v. Waller*, 13 Vt. 231.

⁵ *Warren v. McCarthy*, 25 Ill. 95; see *Hugh v. Higgs*, 8 Wheat. 697.

⁶ *Warren v. McCarthy*, 25 Ill. 95; *Post v. Neafie*, 3 Caine 22; *Evans v. Tatem*, 9 S. & R. 252.

⁷ *Cole v. Driskell*, 1 Blackf. 16; *Sheldon v. Hopkins*, 7 Wend. 435; *Cleveland v. Rogers*, 6 Wend. 438; see *Trader v. McKee*, 1 Scam. 558; *Thomas v. Robinson*, 3 Wend. 267.

⁸ *Taylor v. Walpole*, 1 Blackf. 378; *Loose v. Loose*, 36 Penn. 538; 1 Swan's Pr. 378; 2 Chit. Pl. 388, n.

⁹ *Nash v. Nash*, 16 Ill. 79.

¹⁰ *Stanley v. Chappell*, 8 Cow. 235; 1 Chit. Pl. 99.

¹¹ *Ex parte Wallis*, 7 Cow. 522.

¹² 1 Chit. Pl. 99.

any case, unless the demand is for a sum certain, or for a pecuniary demand which can readily be reduced to a certainty.¹

An action of debt will not lie upon an obligation which says "due one thousand and fifty dollars, payable in county orders, of such size and dimensions as the promisor may be able to furnish;" such an obligation not being for the money named, but for the thing to be furnished.² A joint action of debt will not lie against a lessee, in a lease under seal, and a surety who, by a writing not sealed on the back of the lease, becomes surety for the payment of the rent.³

Where a vendee sued a vendor of land, in debt, for a part of the purchase money paid, declaring specially on the contract of sale, which was under seal, and alleging that the vendor could not convey, by reason of incumbrances, it was held that the action would not lie, but that the remedy was in covenant.⁴

Where a constable has collected money otherwise than by virtue of process, an action will not lie on his bond for a failure to pay over the money.⁵ Where a person executes a bond as surety with another, whose name at the time appears signed to the bond, but whose signature has been forged, the person so executing such bond will be liable thereon.⁶ Debt lies by the beneficiary against a mutual benevolent association to recover the debt benefit secured by a certificate of membership therein.⁷

Actions of debt on statutes, in Illinois.—The statute of Illinois provides that any person who shall cut, fell, box, bore or destroy, or carry away any of the trees or saplings therein enumerated without permission of the owner of the land, shall forfeit and pay for each tree or sapling so cut, etc., the sum of eight dollars; to be recovered either by an action of debt, in the name and for the use of the owner of the land, or by

¹ *Little v. Mercer*, 9 Mo. 218; 1 Chit. Pl. 102; *Mix v. Nettleton*, 29 Ill. 245; *Haynes v. Lucas*, 50 Ill. 436.

² *Mix v. Nettleton*, 29 Ill. 245.

³ *Turney v. Penn*, 16 Ill. 485.

⁴ *Haynes v. Lucas*, 50 Ill. 436.

⁵ *Henckler v. Schulze*, 27 Ill. 39.

⁶ *Davis v. Buckles*, 89 Ill. 237; *Stoner v. Milliken*, 85 Ill. 218; *Ins. Co. v. Brooks*, 51 Mo. 506.

⁷ *Swift v. Ben. Ass'n*, 96 Ill. 311; *Lawrence v. Ins. Co.*, 5 Ill. App. 280; *Ben. Ass'n v. Hall*, 118 Ill. 169; *Society v. Miller*, 23 Ill. App. 341.

action *qui tam*, in the name of any person who will first sue for and recover the same; the one-half for the use of the person so suing, and the other half for the use of the owner of the land.¹

If any drover drives off, or knowingly and willingly permits to be driven off, from the premises of any citizen, or from the range in which the stock of any such citizen may run, to any distance exceeding five miles from such premises or range, any horses, mules, neat cattle, hogs or sheep belonging to such citizen, or permits any such stock to remain with his drove for a longer period than two days and nights at any one time, the owner may bring an action of debt, and recover double the value of such stock so driven away or detained.²

If any engineer on any railroad shall start his train, at any station, etc., without ringing the bell or sounding the whistle a reasonable time before starting, he shall forfeit the sum of not less than \$10, nor more than \$100, to be recovered in an action of debt in the name of the people of the State of Illinois, and such corporation shall also forfeit a like sum, to be recovered in the same manner.³

Every engineer and the railroad corporation failing to come to a full stop at a distance of not less than 200 feet, nor more than 800 feet from the draw in every bridge which crosses any stream or harbor by swing or draw bridge, or from the point of intersection or crossing of another railroad, and in plain sight of the same, before such draw, intersection or crossing is passed by any such train, shall, for each offense, forfeit \$100, to be recovered in an action of debt, in the name of the people of the State of Illinois, or by any person who may sue for the same.⁴

If any public officer, having in custody any person restrained of his liberty, etc., refuses (except in case of imminent danger of escape,) to admit any practicing attorney, whom such per-

¹ Rev. Stat. (1893) 1426; Rev. Stat. (1895) 1524; 2 Starr & Curtis 2388; *Gebhart v. Adams*, 23 Ill. 397; *Elder v. Hiltzheim*, 35 Miss. 231; *Behmeyer v. Odell*, 31 Ill. App. 352; see Form No. 255, *post*.

² Rev. Stat. (1893) 615; Rev. Stat. (1895) 663; 1 Starr & Curtis, 997; see Form No. 256, *post*.

³ Rev. Stat. (1893) 1116; Rev. Stat. (1895) 1200; 2 Starr & Curtis, 1937.

⁴ *Id.*

son may desire to see or consult, to see and consult such person alone and in private, at the jail or other place of confinement, such officer is liable to forfeit and pay to the person aggrieved one hundred dollars, to be recovered by an action of debt.¹

The statutes provide for numerous *qui tam* actions, not particularly referred to here, most of which are usually prosecuted before a justice of the peace, as the penalties come within his jurisdiction. If a statute prohibits the doing of an act under a penalty, and does not prescribe any mode of recovery, an action of debt lies.²

Commencement of the action.—It has already been shown in what cases security for costs is required to be filed before the commencement of an action (*ante*, page 13). The *præcipe* for a summons, or *capias ad respondendum*, may be in the following form :

Præcipe for summons, or capias, in debt.

In the — Court of the County of —, in the State of Illinois.

A. B.)
 vs.) *Debt.*
 C. D.) Debt \$——. *Damages* \$——.

The clerk of the said court will issue a summons, (or, *capias ad respondendum*,) as above, directed to the sheriff of the county of —, and returnable to the — term, 18—.

(*Date.*)

E. F., Attorney for Plaintiff.

To J. K., Clerk, etc.

In debt *qui tam*, omit the *damages*. The sum demanded as the debt should be specified in the *præcipe*, as a summons in debt is defective if it does not demand a particular sum as the debt.³

The declaration.—As in other actions, the declaration ought to pursue the writ, as to the character of the action, the parties, and the extent of the demand.⁴

¹ Rev. Stat. (1893) 510; Rev. Stat. (1895) 553; 1 Starr & Curtis 818; see Form No. 257, *post*.

² 1 Head (Tenn.) 71; *Vaughan v. Thompson*, 15 Ill. 39; *City v. En-*

right, 27 Ill. App. 559; *Durbin v. People*, 54 Ill. App. 101.

³ *Weld v. Hubbard*, 11 Ill. 573.

⁴ *Weld v. Hubbard*, 11 Ill. 573; *Thorpe v. Starr*, 17 Ill. 199; *Carpenter v. Hoyt*, 17 Ill. 529.

Debt lies on a special contract to pay money; and if such contract is specially declared upon, and is not under seal, so that a consideration is necessary, the declaration should show such consideration, and may in general be framed like a declaration in assumpsit, with this exception, that it should be alleged that the defendant "agreed," not that he "promised" to pay.¹ A count commencing and concluding in debt, is not, however, to be regarded as a count in assumpsit merely because the word "promised" is used instead of "agreed."²

In declaring upon a writing not under seal, no profert is made;³ and in Illinois, by statute, it is not necessary, in any pleading, to make profert of the instrument alleged.⁴ Oyer can not be claimed of a deed which appears from the pleading to be lost, or in the possession of the adverse party.⁵

A count on a specialty and one on simple contract may be joined in the same declaration.⁶ But counts in debt and in assumpsit can not be joined.⁷ In a declaration on a judgment of a justice of the peace in another state, the jurisdiction of the justice must be shown.⁸

In a suit on a bond given by a deputy sheriff for the faithful performance of the duties of his office, the plaintiff must assign breaches, and can not, without such assignment, take a verdict for even nominal damages.⁹ A general assignment of a breach, which is sufficient to show on what account the suit is brought, is sufficient.¹⁰

In an action upon a penal bond, in Illinois, the breaches are to be assigned in the declaration, and as many breaches may be assigned in one count as may be deemed necessary, or the declaration may contain as many counts as there are breaches

¹ *Emery v. Fell*, 2 Term 28; 1 Chit. Pl. 362.

² *Cruikshank v. Brown*, 5 Gilm. 75; *McGinnity v. Laguerenne*, 5 Gilm. 101; *Smith v. Webb*, 16 Ill. 105.

³ 1 Chit. Pl. 313.

⁴ Rev. Stat. (1893) 1073; Rev. Stat. (1895) 1157; 2 Starr & Curtis 1786.

⁵ 1 Chit. Pl. 314; *Paddock v. Hig-*

gins, 2 Root 482; *Republic v. Coates*, 1 Yeates 2.

⁶ 1 Chit. Pl. 181; *Man v. Lobdell*, 13 Johns. 462; *Farnham v. Hay*, 3 Blackf. 167.

⁷ *Adams v. Hardin*, 19 Ill. 273.

⁸ *Sheldon v. Hopkins*, 7 Wend. 435; *Trader v. McKee*, 1 Scam. 558.

⁹ *Barnard v. Darling*, 11 Wend. 30.

¹⁰ *Governor v. Ridgway*, 12 Ill. 15; *Hughes v. Smith*, 5 Johns. 163.

of the bond. In the former case, each breach answers the place of a count, and is subject to a demurrer, which may be sustained as to some and overruled as to others, the same as if the breaches were set forth in separate counts.¹ Assignments of breaches of the condition of a bond must be specific enough to inform the defendants of what particular acts they have been guilty.²

In a declaration on a bond conditioned that the defendant would not suffer any unlawful assemblies about his house, an assignment of a breach that he did suffer unlawful assemblies in and about his house during the continuance of his license is not sufficient.³ So, in a suit on a constable's bond, the declaration should set out the particular breach of duty in the officer.⁴ It is not necessary for the plaintiff, in declaring in debt on a recognizance of bail, to allege that a *fi. fa.* had been issued against the principal before the return of the *ca. sa.*⁵

A breach of the condition of a bond "to free the land from all legal incumbrances, either by deed or mortgage now in existence and binding on the premises, by the 20th of February," is not well assigned by following and negating the words of the condition, and such assignment does not necessarily amount to a breach. The plaintiff ought to show some incumbrance existing at the date of the bond and on the 20th of February, or at the commencement of the suit.⁶

In an action on a bond which was conditioned for the payment of a certain sum whenever the obligor should be released from another penal bond previously executed, it was not averred that the obligor had been released or discharged. The declaration was held bad.⁷

In a suit on an official bond, an assignment of breaches in the declaration is held necessary.⁸ Where the condition of a

¹ *Hibbard v. McKindley*, 28 Ill. 240;
see *Brady v. Spurck*, 27 Ill. 478;
People v. Gregory, 11 Bradw. 370;
Robinson v. People, 8 Bradw. 279;
Sugden v. Beasley, 9 Bradw. 71;
People v. Harmon, 15 Bradw. 189.

² *State v. Coffee*, 6 Ohio 150.

⁴ *Boles v. McCarty*, 6 Blackf. 428.

⁴ *Graham v. State*, 6 Blackf. 32;
Major v. State, 8 Blackf. 71.

⁵ *Gillespie v. White*, 16 Johns. 117.

⁶ *Julliand v. Burgott*, 11 Johns. 6.

⁷ *Hart v. Tolman*, 1 Gilm. 1; *Beebe v. Bank*, 1 Johns. 554.

⁸ *State v. Coffee*, 6 Ohio 150; *Boles v. McCarty*, 6 Blackf. 428.

bond may be broken by the omission or commission of a single act, the breach may be assigned in the words of the condition; but if it may be broken in various ways, the assignment should state the particular mode of the breach.¹

In debt on a bond, given on appeal of an action of forcible entry and detainer to the supreme court, and conditioned to pay the value of the use and occupation of the premises, it is not necessary to aver in the declaration that the defendant had enjoyed the use and occupation of the premises. In such case, it is only necessary to allege, in assigning breaches of the bond, that the plaintiff had been deprived of the possession during the pendency of the appeal.²

Where a penal bond is executed by two parties, in which they mutually bind themselves to desist from all interference with a certain tract of land, to which each has previously set up a claim, until the merits of their respective claims shall be settled or adjusted, it seems an action is maintainable for a breach of the condition.³

Where a declaration describes an appeal bond to be payable on demand, and then proceeds to set out the condition at large, so that the true character of the bond appears, the bond may be offered in evidence, although it is not payable on demand, but on the affirmance of the judgment.⁴

A declaration upon an appeal bond is sufficient, which avers that the appeal was not prosecuted, and that the judgment appealed from was not paid, and that such judgment was affirmed. It need not aver that the order dismissing the appeal was filed in the court from which the appeal was taken. An averment that the judgment appealed from was final, or that the judge of the court from which the appeal was taken approved the bond, is unnecessary.⁵

It is well settled that in actions to recover a penalty under a highly penal statute, the averments of the declaration must bring the case clearly within the prohibition, and that the provisions of the statute must be strictly construed. The declara-

¹ *County v. Bledsoe*, 12 Ill. 267;
Major v. State, 8 Blackf. 71.

² *Higgins v. Parker*, 48 Ill. 445.

³ *Wilcoxon v. Roby*, 3 Gilm. 475.

⁴ *Walker v. Welch*, 14 Ill. 277.

⁵ *Sutherland v. Phelps*, 22 Ill. 92.

tion in such a case is to be construed most strongly against the pleader, and every fact necessary to constitute the offense for which the penalty is sought to be recovered must be distinctly averred, and no intendments will be allowed in favor of the prosecution.¹

PRECEDENTS OF DECLARATIONS IN DEBT.

No. 234. *Common indebitatus count.*

In the ——— Court.

— Term, 18—.

STATE OF ILLINOIS, }
County of ———, } sct. A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of debt: For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, was indebted to the plaintiff in the sum of — dollars, for (*here state the subject-matter of the debt, precisely as in assumpsit, ante, pages 76-77, and then proceed:*) which said sum of money was to be paid to the plaintiff by the defendant, when he should be thereto requested: Yet the defendant, though requested, has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

If there are several counts, the breach should be as follows:

Yet the defendant, though requested, has not paid to the plaintiff the several sums of money in the several counts above specified, together amounting to the sum of — dollars, or any part thereof, but refuses so to do; to the damage, etc.

It has been usual, in the commencement of the declaration, to say that the plaintiff complains of the defendant “of a plea that he render to the plaintiff the sum of — dollars, which he owes to and unjustly detains from him;” and this was to be the aggregate of all the sums demanded in the different counts.² Whether strictly necessary or not,³ it would seem to be well to state the aggregate of the sums claimed in the several counts; and this should be the debt demanded by the

¹ *People v. Fesler*, 145 Ill. 150.

² 1 Chitty's Pl. 309, 325, *a*; 2 Chit. Pl. 385, 387; *People v. Van Eps*, 4 Wend. 387.

³ 1 Chit. Pl. 309; 1 Swan's Pr. 185, *i*, 349, *a, b*; *Lord v. Houston*, 11 East 62; *Duppa v. Mayo*, 1 Saund. 288, *n. 1*.

summons, which must demand a particular sum as the debt;¹ but this statement of the debt may be made in the breach, as in the forms here given.

"The debt demanded should regularly be the aggregate of all the sums alleged to be due in the different counts; but a mistake in this respect, whether more or less, will not be a cause of demurrer, nor is it necessary to prove that the debt amounted to precisely the sum stated to be due."²

Where the form used in the commencement is, "of a plea that he render," etc., the words *owes to and* (the *debet*) should regularly be omitted in actions by or against executors or administrators, who in general are to be sued in the *detinet* only.³ But it seems this distinction is no longer strictly observed;⁴ and where the action is simply described in the commencement as "a plea of debt," which is sufficient,⁵ the distinction is of course not made.

It has also been usual, in each count, after setting forth the subject-matter of the debt, etc., to say, "whereby, and by reason of the last mentioned sum of money being and remaining unpaid, an action hath accrued to the plaintiff to demand and have of the defendant the said sum of money last mentioned, parcel (*or* 'other parcel,' *or* 'residue') of the said sum of — dollars above demanded;" but this allegation is unnecessary, and the usual breach at the end of the declaration will suffice. "The distinction is said to be, that whenever the debt arises merely by the judgment or obligation, etc., and not from anything *dehors*, a non-performance of the obligation is to be laid, and the conclusion is to be with the breach *ad damnum*; but that where the debt arises, not by the obligation alone, but also by some matters *dehors* stated in the declaration, there the count should conclude *per quod actio accrevit*, etc., as in debt on a lease for rent."⁶ The clause "whereby," etc., is not, it seems, in the old entries, except in

¹ *Weld v. Hubbard*, 11 Ill. 573.

² 1 Chit. Pl. 309; *Lord v. Houston*, 11 East 62; *Duppa v. Mayo*, 1 Saund. 288, n. 1.

³ 1 Chit. Pl. 310; 2 Chit. Pl. 385.

⁴ 1 Swan's Pr. 185, i; 2 Chit. Pl. 383, p.

⁵ 1 Swan's Pr. 185, i; Wil. Pr. 82, 83, n; see 1 Chit. Pl. 361.

⁶ 1 Chit. Pl. 310; Gilb., tit. Debt. 414, 415; see 1 Swan's Pr. 385, a.

cases where the debt arises from some misfeasance, as on a penal statute, or against a sheriff for an escape, or on leases, awards, etc.¹

No. 235. *Payee against maker of promissory note. Special count on note, and consolidated common counts.*

In the ——— Court.

—— Term, 18 —.

STATE OF ILLINOIS, }

County of ———, { set. A. B., plaintiff, by E. F., his attorney, complains
of C. D., defendant, of a plea of debt: For that
whereas the defendant, on the ——— day of ———, in the year 18—, in the
county aforesaid, made his promissory note, and delivered the same to the
plaintiff, and thereby then and there promised to pay, ——— after the
date thereof, to the plaintiff *or his order*, the sum of ——— dollars, for value
received, *with interest thereon, etc.*: by means whereof the defendant, on
the day *first* aforesaid, there became liable to pay to the plaintiff the sum
of money in the said note specified, according to the tenor and effect
thereof.

And whereas also the defendant, on the ——— day of ———, in the year
18—, in the county aforesaid, was indebted to the plaintiff in the sum of
—— dollars, for goods, chattels and effects before that time sold and delivered
by the plaintiff to the defendant, at his request; and in the like sum
for goods, chattels and effects before that time bargained and sold by the
plaintiff to the defendant, at his request; and in the like sum for work and
services before that time done and bestowed, and materials for the same
work furnished, by the plaintiff for the defendant, at his request; and in
the like sum for money before that time lent by the plaintiff to the defendant,
at his request; and in the like sum for money before that time paid
and expended by the plaintiff for the use of the defendant, at his request;
and in the like sum for money before that time received by the defendant,
for the use of the plaintiff; and in the like sum for interest on divers sums
of money before that time forborne by the plaintiff to the defendant, at his
request, for divers spaces of time before then elapsed; and in the like sum
for money found to be due from the defendant to the plaintiff, on an account
then and there stated between them; which said several sums of
money, so due to the plaintiff as aforesaid, were respectively to be paid to
him by the defendant, on request.

Yet the defendant, though often requested, and though the day of payment
in the said note mentioned has elapsed, has not paid to the plaintiff
the several sums of money in the several counts above specified, together
amounting to the sum of ——— dollars (*the sum mentioned as the debt in the
summons, being the aggregate of all the sums demanded in the several
counts*), or any part thereof, but refuses so to do; to the damage of the
plaintiff of ——— dollars, and therefore he brings his suit, etc.

¹ 2 Chit. Pl. 385, *i*; Gilb., tit. Debt, 413; 1 Swan's Pr. 385, *a*.

The damages, in this action, are in general merely nominal; but if there is a demand for interest, the damages laid should be sufficient to cover it. Interest, whether expressly reserved in the contract, or given by law, is an incident to the debt, and is recovered in the form of damages, without being specially claimed in the declaration;¹ though where given by a statute, it must be specially claimed.²

It is unusual to bring debt on notes not under seal, except where counts on such notes are joined with counts on specialties or records, for the purpose of saving multiplicity of actions.

Where an instrument provides for the payment of interest—as where a note, bill or bond is for the payment of a certain sum, at a certain time after the date thereof, with interest from such date—it would seem that the interest *up to the maturity* of the instrument ought to be considered a part of the *debt*, and that only the interest which has accrued *after* the maturity of the instrument should be considered as *damages*.

In *Marsh v. Wright*, 14 Ill. 248, where the plaintiff declared in debt, for work and labor done, the court said: “As interest was not specifically claimed in the declaration, it could not be considered as part of the debt. If recoverable at all, it was only as damages for the detention of the debt. Judgment should have been entered for the amount of the indebtedness established by the evidence, as the debt, and for the amount of the interest due thereon, as the damages.”

In an action of debt on a promissory note, it was alleged in one count of the declaration that the defendant, on, etc., “by his promissory note of that date, by him made, for value received, four months after the date of the said note, *promised* the plaintiffs to pay them, or their order, without defalcation, the sum of four hundred dollars,” etc.; and the count concluded with a request and refusal to pay. The court held this to be a sufficient count in debt, the word *promised* not being used by way of averment to show the liability of the defendant, but as descriptive of the instrument.³

¹ *McConnell v. Thomas*, 2 Scam. 313.

² *Pearsons v. Hamilton*, 1 Scam. 415.

³ *McGinnity v. Laguerenne*, 5 Gilm. 101; *Cruikshank v. Brown*, 5 Gilm. 75; *Smith v. Webb*, 16 Ill. 105.

No. 236. *On a bill of exchange--Payee against drawer, on default of payment.*

(Commence as in last precedent.) For that whereas the defendant, on, etc., in, etc., made his bill of exchange, and delivered the same to the plaintiff, and thereby then and there requested one G. H. to pay, ——— after the date thereof, to the plaintiff, or his order, the sum of ——— dollars, for value received, *with interest thereon, etc.*; which said bill the said G. H., on the day *first* aforesaid, upon sight thereof, there accepted: And the plaintiff avers that when the said bill became due, to wit, on, etc., the same was there presented to the said G. H. for payment thereof, and he was then and there requested to pay the amount of the said bill, according to the tenor and effect thereof; but that the said G. H. did not nor would then, or at any time before or afterwards, pay the said amount, or any part thereof, but refused so to do; of which premises the defendant then and there had notice: By means whereof the defendant then and there became liable to pay to the plaintiff, on request, the said amount of the said bill; and being so liable, the defendant, in consideration thereof, then and there agreed to pay the said amount to the plaintiff, on request.

(Add counts on the consideration of the bill between the plaintiff and the defendant, the money counts, interest, and account stated—the consolidated common counts, as in the last precedent, may be used—and the following breach:)

Yet the defendant, though requested, has not paid to the plaintiff the said amount of the said bill and the several other sums of money above specified, together amounting to the sum of ——— dollars, or any part thereof, but refuses so to do; to the damage to the plaintiff of ——— dollars, and therefore he brings his suit, etc.

See forms No. 58, and No. 60 (*ante*, page 116), and the observations thereunder.

No. 237. *On an award, where the submission was by arbitration bonds.*

(Commence as in No. 234, *ante*.) For that whereas, certain differences having arisen and being depending between the plaintiff and the defendant, the plaintiff, on, etc., in, etc., by a certain bond of arbitration bearing date of that day, became bound to the defendant in a certain penal sum in the said bond mentioned; and the defendant then and there, by a certain other bond of arbitration, bearing date of the same day, became and was bound to the plaintiff in a certain penal sum in the same bond mentioned; which said bonds were respectively conditioned to (*here set out the substance of the condition, which may be thus—*) abide the award and determination of E. F., an arbitrator indifferently elected and named, as well by and on the behalf of the defendant as by and on the behalf of the plaintiff, to arbitrate and award concerning all actions, causes of action, controversies and demands whatsoever, theretofore had, brought, or depending by and between the said parties, so as the said award should be made in writing, under the hand of the said E. F., and ready to be delivered to the said par-

ties in difference, or whichever of them should desire the same, on or before, etc. And the plaintiff further says, that the said E. F., having taken upon himself the burden of the said arbitration, did in due manner, and within the time for that purpose appointed, to wit, on, etc., there duly make and publish his award in writing, by him subscribed, concerning the said matters in difference between the said parties, ready to be delivered to the said parties in difference, or whichever of them should desire the same, and did thereby award that the defendant should pay to the plaintiff the sum of — dollars, (*set out the award so far as relates to the payment of the money,*) which, when paid, should be in full satisfaction of all claims and demands of the plaintiff upon or against the defendant, for or in respect of the said matters in difference; and the said E. F. did thereby further award that the plaintiff should pay — dollars as and for the costs of that, his award, and that the defendant should, upon demand, repay to the plaintiff one moiety of such sum of — dollars, and that in all other respects the said parties respectively should bear their own costs of that reference; as by the said award, reference being thereunto had, will more fully appear; of which said award the defendant, on the day last aforesaid, there had notice. And although the defendant did afterwards, to wit, on, etc., pay to the plaintiff the said sum of — dollars in the said award mentioned, yet the defendant has not paid to the plaintiff the said sum of — dollars in the said award mentioned, or any part thereof, although to pay the last-mentioned sum of money the defendant was there requested by the plaintiff, to wit, on, etc., aforesaid. Whereby an action has accrued to the plaintiff to demand of the defendant the said sum of — dollars.

(*Add counts for money paid, interest, and on an account stated, in debt, as in No. 235, ante, and common conclusion, as under No. 234.*)

Where the submission is by bond, the plaintiff has an election to sue on the bond or on the award, if it is merely for the payment of money. But if a collateral thing is awarded, the suit must be on the bond, as debt will lie for money only.¹

Where a sum of money is awarded, it is sufficient to set forth so much only of the award as to show a good cause of action.² But if there is any condition precedent, etc., to be performed by the plaintiff, it should be stated, and performance, or a tender and refusal averred.

A verbal award may be set forth substantially.³ In setting forth an award, it seems hardly safe to say that "among other things" it was awarded; but there are authorities which hold this good.⁴

¹ 2 Saund. 62, n. 5.

² 2 Vent. 242.

² 1 Ld. Raym. 115; Bur. 278.

⁴ 1 Mod. 36; Ol. Prec. 506.

In an action of debt on an arbitration bond, it is only necessary that the declaration should show that the award was made in pursuance of the bond, and that the defendant has not complied with the award. The rule is, however, different where the action is directly on the award itself, in which case a mutual submission must be alleged.¹

No. 238. On a judgment of the same court.

(Commence as in No. 234, ante.) For that whereas the plaintiff, in the — term of the said — court, in the year 18—, to wit, on, etc., in the same year, by the consideration and judgment of the said court recovered against the defendant, in a certain action of —, the sum of — dollars, damages (or, “the sum of — dollars, debt, and the further sum of — dollars, damages for the detention thereof,” according to the record), and also the costs of the plaintiff in that behalf, taxed at the sum of — dollars, whereof the defendant was convicted, as by the record thereof, remaining in the said court, more fully appears; which said judgment still remains in full force. Yet the defendant has not paid to the plaintiff the said sums of money so by him recovered as aforesaid, together amounting to the sum of — dollars, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc. (Let the damages be enough to cover the interest.)

In an action on a judgment for the defendant, for costs, the recovery may be described as being for “the costs of the plaintiff, taxed at the sum of — dollars, by him expended in and about his defense of a certain action of, etc., then lately prosecuted against him in the same court, by the defendant, whereof,” etc.

Care should be taken to set forth the particulars of the judgment correctly—the amount, and the court and term in which rendered, etc.² The allegation that the judgment remains in full force, though usually inserted, is not necessary.³

No. 239. On a judgment of a court of another state.

(Commence as in No. 234, ante.) For that whereas the plaintiff, in the — term, in the year 18—, of the — court of the county of —, in the state of —, to wit, on, etc., in the same year, by the consideration and judgment of the same court recovered against the defendant, in a certain

¹ *Cole v. Chapman*, 2 Scam. 35.

Ohio 397; see *Spangler v. Pugh*, 21

² 2 Chit. Pl. 483, notes; Com. Dig.

Ill. 85.

Pl. 2 W. 12; *Bibbins v. Noxon*, 4

³ 2 Chit. Pl. 484, n.; *Hancock v.*

Wend. 207; *Wolf v. Pounsford*, 4

Proud, 1 Saund. 330, n. 4.

action of —, the sum of — dollars, damages, (or “the sum of — dollars, debt, and the further sum of — dollars, damages for the detention thereof,” *according to the record*,) and also the costs of the plaintiff in that behalf, taxed at the sum of — dollars, whereof the defendant was convicted; as by the record thereof, remaining in the same court, more fully appears; which said judgment still remains in full force: Yet, etc., (*concluding as in last precedent*.)

By the constitution of the United States, and the acts of congress, judgments *in personam* in the various states are placed on the same footings as domestic judgments, and are to have the same force and credit, when sought to be enforced in other states, as they have by law or usage in the particular states where rendered.¹

The settled construction of the constitution and laws of the United States upon this subject is, that the judgment of a state court shall have the same credit, validity and effect, in every other court in the United States which it had in the state where pronounced; and that whatever pleas would be good to a suit thereon in such state, and none other, can be pleaded in any other court in the United States.²

The legal presumption, in the absence of evidence to the contrary, is in favor of the jurisdiction of a court of record of another state, which has assumed to exercise jurisdiction over a subject-matter in controversy between parties residing there.³ A foreign judgment can not be sued unless it is final and conclusive in the country or state where it was rendered, according to the law of that place. It should be complete and definite in its nature, and a valid and subsisting obligation, and it must be certain or capable of being made so.⁴

A judgment which by the laws of the state where rendered is conclusive on the parties, is equally so when suit is brought

¹ *Welch v. Sykes*, 3 Gilm. 198; *Bimeler v. Dawson*, 4 Scam. 536; *Kimmel v. Shultz*, Breese 169; *Ducommun v. Hysinger*, 14 Ill. 249; *Dow v. Blake*, 148 Ill. 76.

² *Hampton v. McConnell*, 3 Wheat. 234; *Mills v. Duryee*, 7 Cranch 481; *Lawrence v. Jarvis*, 32 Ill. 304.

³ *Shumway v. Stillman*, 4 Cow. 292;

Shumway v. Stillman, 6 Wend. 447; *Mills v. Martin*, 19 Johns. 33; *Adams v. Jeffries*, 12 Ohio 253; *Smith v. Rhoades*, 1 Day 168; *Harrod v. Barretto*, 1 Hall (N. Y.) 155; *McElmoyle v. Cohen*, 13 Pet. 312; *Rosenthal v. Rennick*, 44 Ill. 202.

⁴ *Dow v. Blake*, 148 Ill. 76.

thereon in another state.¹ An action of debt lies upon a final decree for alimony rendered in another state.²

No. 240. On a judgment of a justice of the peace of another state.

(Commence as in No. 234, ante.) For that whereas the plaintiff, on, etc., before one F. G., Esquire, one of the justices of the peace, within and for the county of —, in the state of —, by the consideration and judgment of the said justice recovered against the defendant the sum of — dollars, damages, and the costs of the plaintiff in that behalf, taxed at the sum of — dollars; which said judgment still remains in force: And the plaintiff in fact says, that the said justice then and there had jurisdiction of the person of the defendant, and by the statute of that state, then in force, then and there had jurisdiction of the subject-matter adjudicated in that behalf which said statute is as follows, that is to say: (*Here set out so much of the law of the state as gives jurisdiction.*) Yet the defendant has not paid to the plaintiff the said sums of money so by him recovered as aforesaid, together amounting to the sum of — dollars, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc. (*Counts on the original debt, and on an account stated, may be inserted.*)

In declaring upon a justice's judgment of another state, the statute giving jurisdiction to the justice must be pleaded. The general averment of jurisdiction of a justice of the peace, in such case, is not enough.³

In order to entitle a transcript of a judgment of a justice of the peace of another state to be received in evidence, it must be shown, by the laws of the state where the judgment was rendered, that the justice had jurisdiction of the subject-matter upon which he attempted to adjudicate.⁴

No. 241. Declaration in action for rent, on a demise.

(Commence as in No. 234, ante.) For that whereas the plaintiff, on etc., in etc., demised to the defendant a certain parcel of land, with the appurtenances, situate, etc., to have and to hold the same to the defendant for and during the term of — years then next ensuing, yielding and paying

¹ *Belton v. Fisher*, 44 Ill. 32; *Amblor v. Whipple*, 139 Ill. 311; *Stark v. Ratcliff*, 111 Ill. 81; *Kopperl v. Nagy*, 37 Ill. App. 24; *Dow v. Blake*, 148 Ill. 76.

² *Dow v. Blake*, 148 Ill. 76.

³ *Sheldon v. Hopkins*, 7 Wend. 435;

Thomas v. Robinson, 3 Wend. 267; see *Cleveland v. Rogers*, 6 Wend. 438; 2 Cow. & Hill's Notes to Phil. Ev. part 2.

⁴ *Trader v. McKee*, 1 Scam. 558; see elaborate note by reporter to this case.

therefor, during the said term, to the plaintiff, the yearly rent of — dollars, payable quarterly, that is to say, on, etc., etc., by equal portions; by virtue of which said demise, the defendant, on the day first aforesaid, entered into the said demised property, and was possessed thereof from thenceforth until the — day of, etc., when a large sum, to-wit, — dollars of the rent aforesaid, for the space of — —, ending on the day last aforesaid, became due from the defendant to the plaintiff.

(*Second count, for use and occupation.*) And whereas also the defendant on., etc., in, etc., was indebted to the plaintiff in the further sum of — dollars, for the use and occupation of a certain other parcel of land of the plaintiff, with the appurtenances, by the defendant held, used and occupied, at his request, and by the sufferance and permission of the plaintiff, for a long space of time before then elapsed; which last mentioned sum of money was to be paid by the defendant to the plaintiff, on request.

(*Breach.*) Yet the defendant, though requested, has not paid to the plaintiff the said sums of money so due to him as aforesaid, together amounting to the sum of — dollars, or any part thereof, but refuses so to do to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The first count of the above form may be used, whether the demise was by deed or by parol. It is settled that in debt for rent reserved by deed (except of incorporeal hereditaments), the plaintiff may declare without stating the deed. This is the only case in which the plaintiff is allowed to declare generally, and to produce a deed in evidence in support of such declaration.¹ When the declaration sets out the *lease*, it is similar to the declaration in covenant for rent (*ante*, No. 152), except in the commencement and conclusion.² It is not necessary to show the local situation of the demised property.³ The count in debt for use and occupation is sustainable, when the demise is not by deed, or there was no covenant sealed by the defendant.⁴

No. 242. On a single bill, or sealed note.

(*Commence as in No. 234, ante.*) For that whereas the defendant, on, etc., in, etc., by his writing obligatory, bearing date of that day, and now to the court here shown, bound himself to pay to the plaintiff, — —

¹ 2 Chit. Pl. 430, n; *Duppa v. Mayor*, 1 Saund. 276, n. 1, 4; *Salmon v. Smith*, *Ibid.* 202; *Veale v. Warner*, *Ibid.* 225, n. 4.

² 2 Chit. Pl., 430, n.

³ *Ibid.*, 3 M. & L. 380; 4 Taunt. 25; *King v. Frazer*, 6 East 348.

⁴ 2 Chit. Pl. 430, n; *Wilkins v. Wingate*, 6 T. R. 62; *Elger v. Marsden*, 5 Taunt. 25.

after the said date thereof, the sum of — dollars; yet the defendant has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The common counts may be inserted, with the general breach, as in No. 235.

Where a sealed instrument is declared upon, and described as such, or a word of art used which imports that it is sealed, such as "writing obligatory," "deed," or "indenture," a delivery is never averred; and the sealing and delivery, without an averment thereof, will be implied.¹

An instrument *under seal* is not a *promissory note*, though like one in form,² and should not be described as such in a pleading, but as a writing obligatory. A bill obligatory, it is said, "is a bond without condition, sometimes called a single bill, and differs in nothing from a promissory note but in the seal which is affixed to it."³

Profert.—The omission of a *profert*, when necessary, can be taken advantage of only by special demurrer.⁴ If, however, a bond or other deed is pleaded with a *profert* (where necessary), and the defendant pleads *non est factum*, and the plaintiff can not produce the deed at the trial, he will be nonsuited. It is, therefore, sometimes necessary or advisable to insert in the declaration, or in one count, an excuse of the *profert*, as, "and which said writing obligatory having been lost (or 'destroyed by accident,' or 'by the defendant,' or 'being in the possession of the defendant'), the plaintiff can not produce the same to the court here."⁵ But in Illinois, by statute, it is not necessary, in any pleading, to make *profert* of any instrument.⁶

Actions on penal bonds for the performance of covenants
—**Statute.**—Section 20 of the Illinois Practice Act provides

¹ *Cabell v. Vaughan*, 1 Saund. 291, n. 1.

² 2 Bouv. Dic. 392; see *Smith v. Webb*, 16 Ill. 105.

³ 2 Bouv. Dic. 179; *Bank v. Greiner*, 2 Serg. & Rawle, 115.

⁴ 1 Chit Pl. 315; Com. Dig., tit. Pl. S. 17.

⁵ 2 Chit. Pl. 439; *Smith v. Woodward*, 4 East 585; 2 Campb. 557; Rev. Stat. (1893) 1073.

⁶ *Starr & Curtis* 1786; Rev. Stat. (1895) 1157.

that "in actions brought on penal bonds, conditioned for the performance of covenants, the plaintiff shall set out the conditions thereof, and may assign in his declaration as many breaches as he may think fit; and the jury, whether on trial of the issue or of inquiry, shall assess the damages for so many breaches as the plaintiff shall prove, and the judgment for the penalty shall stand as a security for such other breaches as may afterwards happen, and the plaintiff may at any time afterwards sue out a writ of inquiry, to assess damages for the breach of any covenant or covenants contained in such bond, subsequent to the former trial or inquiry; and whenever execution shall be issued on such judgment, the clerk shall indorse thereon the amount of damages assessed by the jury, with the costs of suit, and the sheriff or coroner shall only collect the amount so indorsed; *provided*, that in all cases where a writ of inquiry of damages shall be issued for any such breaches subsequent to the first trial or inquiry, the defendant, or his agent or his attorney, shall have at least ten days' notice, in writing, of the time of executing the same."¹

Judgment, etc., in actions on penal bonds.—In actions of debt on penal bonds the judgment for the plaintiff is for the penalty, the debt *in numero* to be discharged by the payment of the damages assessed, which are to be found separately. The execution issues for the debt, with an indorsement by the clerk of the amount of the damages, which amount only the officer is to collect.²

No. 243. On a bond given on an appeal to the supreme court.

(*Title of court, etc.*) A. B., plaintiff, by E. F., his attorney, complains of C. D. and G. H., defendants, of a plea that they render to the plaintiff the sum of — dollars (*the penalty*), which they owe to and unjustly detain from him: For that whereas the defendants, on, etc., in, etc., by their writing obligatory, bearing date of that day, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the said sum of — dollars, to be paid to the plaintiff; which said writing

¹ Rev. Stat. (1895) 1158.

² *Austin v. People*, 11 Ill. 452; *McConnell v. Swailes*, 2 Scam. 571; *Frazier v. Laughlin*, 1 Gilm. 347; *Hinckley v. West*, 4 Gilm. 136; *Toles v. Cole*, 11 Ill. 562; *Erlinger v. People*, 36 Ill. 458; *Freeman v. People*, 54 Ill. 153; *R. R. Co. v. Steele*, 69 Ill. 253; *Parisher v. Waldo*, 72 Ill. 71.

obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect that in the — term, in the year 18—, of the *said* circuit court of the county of — aforesaid, on the — day of —, in the same year, by the consideration and judgment of that court the plaintiff recovered against the said C. D., in a certain action of —, the sum of — dollars, damages (or “the sum of — dollars, debt, and the further sum of — dollars damages for the detention thereof,” *according to the bond*), and the costs of the plaintiff in that behalf, taxed at the sum of — dollars, from which said judgment the said C. D. had taken an appeal to the supreme court of the said state, it was provided that if he, the said C. D., should duly prosecute his said appeal, and should pay to the plaintiff the amount of the said judgment, and all interest thereon, and all such costs and damages as should by the said supreme court be awarded to the plaintiff in case the said judgment should be affirmed, or the said appeal dismissed, then the said writing obligatory was to be void, otherwise to remain in full force; as by the said writing obligatory, and the said condition thereof, remaining affixed in the said circuit court, will appear. And although afterwards, in the — term, in the year 18—, of the said supreme court, to wit, on the — day of —, in the same year, at —, by the consideration of the same court (*) the said judgment in the said writing obligatory mentioned was affirmed, and the plaintiff recovered against the said C. D. the costs of the plaintiff by him about his defense of the said appeal expended, taxed at the sum of — dollars, whereof the said C. D. was convicted; nevertheless the said C. D. has not paid to the plaintiff the amount of the said judgment in the said writing obligatory mentioned, and the interest thereon, and the costs last aforesaid, or any part of the same: (*) whereby an action has accrued to the plaintiff to demand of the defendants the said sum of — dollars (*the penalty*) above demanded. Yet the defendants, though requested, have not paid that sum of money, or any part thereof, to the plaintiff, but refuse so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc. (*Lay the damages at a sum sufficient to cover the judgment, interest and costs.*)

If the appeal was dismissed, then, in lieu of the words between the two asterisks, say:

“The said appeal was dismissed for want of prosecution, (or ‘for a failure to file in the office of the clerk of that court, as required by law, an authenticated copy of the record of the said judgment in the said writing obligatory mentioned’), and the plaintiff recovered against the said C. D., as well the sum of — dollars, for the damages of the plaintiff in that behalf, as his costs about his defense of that appeal expended, taxed at the sum of — dollars, whereof the said C. D. was convicted; nevertheless the said C. D. has not paid to the plaintiff the amount of the said judgment in the said writing obligatory mentioned, and the interest thereon, and the damages and costs last aforesaid, or any part of the same.”

The dismissal of an appeal or *certiorari* is held to be

equivalent to an affirmance of the judgment of the court below, so as to entitle the obligee to claim a forfeiture of the bond, and to have his action thereon.¹ But as the statute of Illinois only gives damages on the *dismissal* of an appeal for want of prosecution, or for a failure to file in the supreme court a transcript of the record,² it would seem that the declaration ought to allege a dismissal, and an award of damages, where such is the fact.³

A declaration on an appeal bond is sufficient which avers that the appeal was not prosecuted, that the amount of the judgment was not paid, and that the judgment was affirmed. Such declaration need not aver that the order dismissing the appeal was filed in the court below, or that the judgment appealed from was final, or that the appeal bond was approved by the court.⁴

An appeal bond is binding on the obligors (to the extent of the obligation), though the condition thereof may not be as broad as the language of the statute.⁵ But where an appeal bond contains conditions which are not required by the statute such conditions are not obligatory on the makers.⁶

The obligors on an appeal bond are estopped by their bond to deny the existence of a valid, unsatisfied judgment at the time the bond was executed.⁷

At common law, the conditions of a bond may be in part valid and in part void, if they are severable; and the same rule applies to statutory bonds, where the statute is silent as to the effect of a departure from the statutory form. If the good and bad conditions are incapable of severance, the bond is wholly bad.⁸

¹ *McConnell v. Swailes*, 2 Scam. 571; *Sutherland v. Phelps*, 22 Ill. 92; see *O'Neil v. Nelson*, 22 Ill. App. 531; *Daggett v. Mensch*, 141 Ill. 395.

² Rev. Stat. (1893) 1081; Rev. Stat. (1895) 1165; 1 Starr & Curtis, 1836.

³ *Daggett v. Mensch*, 141 Ill. 395.

Sutherland v. Phelps, 22 Ill. 91; *Courson v. Browning*, 78 Ill. 208.

⁵ *Fournier v. Faggott*, 3 Scam. 347; *Young v. Mason*, 3 Gilm. 55.

⁶ *Tomlin v. Green*, 39 Ill. 225.

⁷ *Smith v. Lozano*, 1 Bradw. 171.

⁸ *Erlinger v. People*, 36 Ill. 458; *U. S. v. Brown*, Gilpin's R. 178; *Vroom v. Executors*, 2 Green (N. J.) 480; *Commonw. v. Pearce*, 7 Mon. 317; see *Higgins v. Parker*, 48 Ill. 445.

The penalty of a bond can only be claimed by the obligor in the bond or his legal representatives.¹

No. 244. On a replevin bond (given in a suit in the same court).

(*Title of court, etc.*) A. B., plaintiff, who sues in this behalf for the use of C. D., complains of E. F. and G. H., defendants, of a plea that they render to the plaintiff, for the use aforesaid, the sum of — dollars, which they owe to and unjustly detain from him: For that whereas the said E. F., on, etc., in, etc., made his plaint to the said — court of the county aforesaid, of the *taking and* unjustly detaining of his goods and chattels by the said C. D., and thereby prayed that the said goods and chattels, therein described, might be forthwith replevied and delivered to him, the said E. F., by the sheriff of the county aforesaid; and the said E. F. then and there made oath, before the clerk of the said court, that he, the said E. F., was then the owner and lawfully entitled to the possession of the said goods and chattels, and that the same had not been taken for any tax, assessment or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of him, the said E. F., liable to execution or attachment: And thereupon there issued then and there, from the said court, a certain writ of replevin, directed to the sheriff of the said county, whereby the people of the said State of Illinois commanded such sheriff that if the said E. F. should give bond to such sheriff, with good and sufficient security, to prosecute the suit of the said E. F. in that behalf to effect, and without delay, and to make return of the said goods and chattels, if return thereof should be awarded, and to save and keep harmless such sheriff in replevying the said goods and chattels, then such sheriff should without delay replevy and deliver to the said E. F. the said goods and chattels which the said C. D. *took and* unjustly detained, as it was said, and that such sheriff should have that writ, together with such bond, before the said court, on the first day of the next — term thereof; which said writ, on the day first aforesaid, was there delivered, for execution thereof, to the plaintiff, who then and from thence until and at and after the time of the making of the writing obligatory hereinafter mentioned, and the replevying of the said goods and chattels as hereinafter mentioned, was sheriff of the county aforesaid:

And thereupon the plaintiff, so being such sheriff as aforesaid, took from the said E. F., and from the said G. H. as a good and sufficient surety, bond in double the value of the said goods and chattels so about to be replevied: and on that occasion they, the said E. F. and G. H., then and there, by their writing obligatory, commonly called a replevin bond, bearing date of the day first aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the plaintiff, so being such sheriff as aforesaid, in the sum of — dollars above demanded, to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said E. F. should prosecute his

¹ *Sanders v. Filley*, 12 Pick. 544; *Lovejoy v. Stelle*, 18 Ill. App. 281.

said suit to effect, and without delay, and should make return of the said goods and chattels, if return thereof should be awarded, and should save and keep harmless the plaintiff, so being such sheriff as aforesaid, in replevying the said goods and chattels, then the said writing obligatory was to be void, otherwise to remain in full force; as by the said writing obligatory and the said condition thereof, remaining affiled in the said court, will appear: And thereupon the plaintiff, so being such sheriff as aforesaid, by virtue of the said writ then and there replevied and made deliverance of the said goods and chattels to the said E. F., as by the said writ the plaintiff was commanded: (*) And thereupon afterwards, in the said court, as of the *said* — term thereof, in the year 18—, the said E. F. declared against the said C. D. in the said plea of *taking and* detaining the said goods and chattels, and by the said declaration complained that the said C. D., on, etc., aforesaid, in, etc., aforesaid, *took* the goods and chattels of him, the said E. F., in the said declaration more particularly described, *and them* unjustly detained, until, etc., to the damage of him, the said E. F., of — dollars, etc.: And such proceedings were thereupon had in that plea, in the said court, that afterwards, in the *same* term, it was considered and adjudged by the said court that the said E. F. should take nothing by his said writ; and that the said C. D. should go thereof without day, and should have a return of the said goods and chattels. And the plaintiff in fact says, that the said E. F. did not make a return of the said goods and chattels, but has hitherto refused, and still refuses, so to do; whereby an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the said sum of — dollars above demanded. Yet the defendants, though requested, have not paid to the plaintiff the said sum of money above demanded, or any part thereof, but refuse so to do; to the damage of the plaintiff, for the use aforesaid, of — dollars, and therefore, for the use aforesaid, he brings his suit, etc.

If there was judgment of *non pros.* in the action of replevin, then proceed, from the asterisk in the above form, as follows:

And the plaintiff in fact says, that the said E. F. did not prosecute his said suit to effect, but therein wholly failed; and thereupon afterwards, in the *said* — term of the said court, it was considered by the said court that the said E. F. should take nothing by his said writ, and that the said C. D. should go thereof without day, and should have a return of the said goods and chattels: And the plaintiff further in fact says, that the said E. F. did not make a return of the said goods and chattels, but has hitherto refused and still refuses, so to do; whereby, etc. (*as in the above precedent, to the end*).

The following is suggested as a shorter and probably sufficient form of declaration on a replevin bond.¹

¹ See 1 Swan's Pr. 364, b; *Morse v. Parker*, 1 Met. (Mass.) 508; Wil. Dig. *Hodsdon*, 5 Mass. 314; *Simonds v. tit. Bond*.

No. 245. *Another form of declaration on a replevin bond.*

(Commence as in last precedent.) For that whereas the defendants, on, etc., in, etc., by their writing obligatory, bearing date of that day, did jointly and severally acknowledge themselves to be held and firmly bound unto the plaintiff, then being sheriff of the county aforesaid, in the sum of — dollars above demanded, to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written whereby, after reciting to the effect that the said E. F., on the day first aforesaid, sued out of the said — court of the county aforesaid a certain writ of replevin against the said C. D., for the recovery of certain goods and chattels in the said condition described, and that the plaintiff, so being such sheriff, was about to execute the said writ, it was provided that if the said E. F. should prosecute his suit in that behalf to effect, and without delay, and should make return of the said goods and chattels, if return thereof should be awarded, and should save and keep harmless the plaintiff, so being such sheriff as aforesaid, in replevying the said goods and chattels, then the said writing obligatory was to be void, otherwise to remain in full force; as by the said writing obligatory and the said condition thereof, remaining affiled in the said court, will appear. And although afterwards, to wit, on the day first aforesaid, the plaintiff, so being such sheriff as aforesaid, by virtue of the said writ there replevied and made deliverance of the said goods and chattels to the said E. F.; and although afterwards, in the — term of the said court, in the year 18—, it was considered and adjudged by the said court that the said E. F. should take nothing by his said writ and that the said C. D. should go thereof without day, and should have a return of the said goods and chattels, nevertheless the said E. F. did not make a return of the said goods and chattels, or any part thereof, but has hitherto refused, and still refuses, so to do; whereby an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the said sum of — dollars above demanded. Yet, etc. (*concluding as in last precedent*).

In an action on a replevin bond, the breach need not be formally assigned; but the plaintiff is entitled to recover, if a sufficient breach otherwise appears.¹ An averment of the issuing of a writ of *retorno habendo* is unnecessary in an action on a replevin bond.² Such writ need not be issued and returned before an action can be brought on the replevin bond. It will be sufficient if a return was awarded and the property has not been returned.³

¹ *Perreau v. Bevan*, 5 B. & C. 284; 2 Chit. Pl. 462, n.; *Hunter v. Sherman*, 2 Scam. 539.

² *Hunter v. Sherman*, 2 Scam. 539; 2 Chit. Pl. 462, n.

³ *Peck v. Wilson*, 22 Ill. 205; *Smith v. Pries*, 21 Ill. 656; *Rankin v. Kinsey*, 7 Bradw. 215; *Moorehead v. Yeazel*, 10 Bradw. 263.

It is sufficient to allege the execution and delivery of the bond, and a breach of its condition, by a judgment in the plaintiff's favor in the replevin suit, and a failure to return the property.¹ The breach need not be set out in broader terms than those used in the condition, nor need the proof be more extensive than the breach.² The declaration concisely states the proceedings in replevin, and the failure to fulfill the condition of the bond, and need not set out the goods replevied.³ The condition of the bond should be correctly stated.⁴ When the declaration states the bond in legal effect it is unnecessary to prove its execution unless the same is denied by a plea verified by affidavit.⁵

The declaration is not double, although both parts of the condition are negatived; and if a sufficient breach appears, the plaintiff will be entitled to recover, although the breach is not formally assigned.⁶ A breach following the language of the condition, that the defendant did not prosecute his suit with effect, and without delay, is sufficient; and proof of two years' delay would suffice, without proving a judgment of *non pros*.⁷ Where a replevin bond was taken by a sheriff, and, his term of office expiring, the writ was returned unexecuted, and a new writ was afterward issued, which was executed by the successor without taking a new bond, it was held that an action could be maintained on the bond taken by the former sheriff.⁸

It is essential to the validity of a replevin bond that the name of the defendant in the suit appear therein. Without this, such bond is a nullity; and the omission can not be supplied by averment and proof.⁹

In an action on a replevin bond, the plaintiff is at liberty to go into the question of damages for the detention of the property, but he is not obliged to do so. He may abide by the

¹ *Schott v. Youree*, 142 Ill. 233.

² *Peck v. Wilson*, 22 Ill. 205; *Hunter v. Sherman*, 2 Scam. 539; *Kellogg v. Boyden*, 126 Ill. 379.

³ 3 M. & S. 180; 2 Chit. Pl. 459, n.

⁴ 2 Chit. Pl. 458, n.

⁵ *Horner v. Boyden*, 27 Ill. App. 573.

⁶ *Manning v. Pierce*, 2 Scam. 6; *Hunter v. Sherman*, 2 Scam. 539; 2 Chit. Pl. 469, n.; but see *Vinyard v. Barnes*, 124 Ill. 346.

⁷ *Axford v. Perrett*, 4 Bing. 287; 2 Chit. Pl. 461, n.

⁸ *Petrie v. Fisher*, 43 Ill. 442.

⁹ *Arter v. People*, 54 Ill. 228.

assessment in the replevin suit, and take a verdict in the pending suit merely for the value of the property. But if the plaintiff, in the action on the bond, in fact introduces evidence as to the damages for the detention of the property, the judgment in that case, when satisfied, will be a bar to a *scire facias* to revive a judgment rendered for damages in the action of replevin.¹ It is said that in an action on a replevin bond, evidence is admissible of damages sustained by reason of the detention of the property before the awarding of a return.²

The accidental destruction of goods wrongfully replevied will not discharge the liability of the plaintiff in the replevin suit to make return of the property when so ordered, and can not be set up in defense to an action on the replevin bond.³ Attorney's fees are within the condition of a replevin bond providing for the payment of all costs and damages occasioned by the wrongful suing out of the writ.⁴

It has been held that in an action on a replevin bond given in replevin of property levied on under execution, the plaintiff may recover the costs incurred by the judgment debtor in the action in which the judgment was recovered.⁵

An instrument in the form of, and intended as a replevin bond, containing the recitals of such bond, with the statement that it was under the hands and seals of the obligors, but not in fact under seal, yet, which filled the office of a replevin bond and secured the execution of the writ, must be held as a contract of indemnity and receive the same construction as a statutory replevin bond for which it was intended.⁶

See observations following precedent No. 280, page 502, *post*.

¹ *Shepard v. Butterfield*, 41 Ill. 76.

² *Shepard v. Butterfield*, 41 Ill. 76; see *Stevison v. Earnest*, 80 Ill. 513; *Atkins v. Moore*, 82 Ill. 240; *Savage v. French*, 13 Bradw. 17.

³ *Suppiger v. Gruaz*, 137 Ill. 216.

⁴ *Siegel v. Hanchett*, 33 Ill. App. 634; *Harts v. Wendell*, 26 Ill. App. 274; *Dalby v. Campbell*, Id. 502.

⁵ *Larson v. Laird*, 36 Ill. App. 402.

⁶ *Edwin v. Cox*, 61 Ill. App. 567.

No. 246. *On a sheriff's bond—For a failure by the sheriff to make the amount of an execution.*

In the — Circuit Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of —. } set. The People of the State of Illinois, plaintiff, which sues in this behalf for the use of A. B., complains of C. D., E. F., and G. H., defendants, of a plea that they render to the plaintiff, for the use aforesaid, the sum of ten thousand dollars, which they owe to and unjustly detain from the plaintiff: For that whereas the defendants, on, etc., in, etc., by their writing obligatory, bearing date of that day, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of ten thousand dollars above demanded, to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect that the said C. D. had been duly elected sheriff of the county of — aforesaid, it was provided that if he, the said C. D., should faithfully discharge all the duties required or to be required of him by law, as such sheriff, then the said writing obligatory was to be void, otherwise to remain in full force; as by the said writing obligatory and the said condition thereof, remaining affiled in the office of the county clerk of the county aforesaid, will appear: And the said writing obligatory afterwards, and within twenty days after notice to the said C. D. of his commission as such sheriff, to wit, on, etc., in the — term of the said court in the same year, was approved by the judge of the county court of said county, and became the official bond of the said C. D., as such sheriff as aforesaid; and thereupon he, the said C. D., then and there took and subscribed, before the clerk of the said court, the several oaths required by law, and an oath for the faithful performance of the duties of his said office of sheriff, and took upon himself the performance of those duties and thenceforth has been, and still is, sheriff of the county aforesaid. Yet, the plaintiff in fact says, that the said C. D. has not faithfully discharged all the duties required of him by law as such sheriff, but has neglected and refused so to do, to the injury of the said A. B.

And for assigning a breach of the said condition of the said writing obligatory, the plaintiff says, that the said A. B., on, etc., in the — term of the said court, in that year, by the consideration and judgment of the said court recovered against one J. K. the sum of — dollars damages, and the costs of the said A. B. in that behalf, whereof the said J. K. was convicted; and for obtaining satisfaction of the said damages and costs, the said A. B. afterwards, to wit, on, etc., sued out of the said court a certain writ of *fiery facias*, directed to the sheriff of the county aforesaid, whereby the said people commanded such sheriff that of the goods and chattels, lands and tenements, in his county, of the said J. K., such sheriff should cause to be made the damages aforesaid, and the sum of — dollars, the costs aforesaid, together with interest thereon, at the rate of five per centum per annum, from the time of recovering the same as aforesaid, and also the further sum of —, accruing costs on the said judgment, and that said sheriff should have those moneys ready to render to the said A. B., according

to law, and should make return of the said writ in ninety days after the date thereof; which said writ, on the day last aforesaid, was there delivered to the said C. D., so being such sheriff as aforesaid, to be executed. And although there were then and afterwards, before and on the return day of the said writ, divers goods and chattels, lands and tenements, of the said J. K., within the county aforesaid, subject to execution, out of which the said C. D. might and ought to have caused to be made the said moneys, as by the said writ he was commanded, whereof he then and there had notice; yet the said C. D., not regarding the duties of his said office, did not nor would, before or on the return day of the said writ, cause to be made those moneys, or any part thereof, but wholly neglected so to do, nor did nor would he make return of the said writ, as he was therein commanded (although the return day thereof has long since elapsed), but has hitherto neglected, and still neglects, so to do. By means of which premises the said A. B. has been and is deprived of the means of obtaining the said moneys so commanded to be levied as aforesaid, and which are still wholly unpaid; and thereby an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the said sum of ten thousand dollars above demanded. Yet the defendants, though requested, have not paid that sum, or any part thereof, to the plaintiff, but refuse so to do; to the damage of the plaintiff, for the use aforesaid, of — dollars, and therefore the plaintiff, for the use aforesaid, brings suit, etc.

If the execution has been returned “no property,” then, in lieu of the allegation that the sheriff did not return the writ, the pleader may insert:

“And on, etc., falsely and deceitfully returned to the said court, upon the said writ, to the effect that in his county the said J. K. had no goods or chattels, lands or tenements, whereof he, the said C. D., could cause to be made those moneys, or any part of the same.”

If the sheriff has made the amount of the execution, but neglected to pay it over, and has falsely returned “no property,” then after alleging the delivery of the writ, the pleader may aver as follows:

“By virtue of which said writ the said C. D., as such sheriff as aforesaid, afterwards, to wit, on, etc., there caused to be made the said moneys so by the said writ commanded to be levied as aforesaid; yet the said C. D., not regarding his duty as such sheriff, had not those moneys, or any part thereof, ready to render to the said A. B., at the return of the said writ, according to the exigency thereof, but therein wholly failed, nor has the said C. D. paid those moneys, or any part thereof, to the said A. B.; and on, etc., the said C. D. falsely and deceitfully returned,” etc.

In an action (on the case) against a sheriff, for failing to make the amount of an execution, the declaration contained two counts, the first averring in substance that the sheriff took certain personal property in execution, but did not make the money out of the same, and "wrongfully, falsely and deceitfully" returned upon the writ that the suit having been appealed, as per bond and the order of the court thereto annexed, the writ was returned in no part satisfied; and the second count averring in substance that the defendant in execution had personal property which the sheriff might have taken, whereof he had notice, but that he neglected and refused so to do, and "wrongfully, falsely and deceitfully" returned the writ as alleged in the first count. The court said, that the gist of this action was that the sheriff neglected his duty in failing to seize property, or, having seized property, in failing to sell it and make the money; and that the matter of the return was not essential.¹

It is perhaps unnecessary to allege the taking of the oath by the sheriff.² In an action on an appeal bond, it is held, the approval of the bond need not be averred.³

The fact that the official bond of a constable was not given until some nineteen months after his election will not affect the validity of the bond. It will be presumed, from the mere fact of its execution, that such bond was given, under the statute, because the sureties in a former bond were insufficient; and in declaring on a bond so given, it is not necessary to set out the order of the proper authority requiring the same.⁴

If an officer, in whose hands an execution is placed, so delays making a proper seizure of property, without the consent of the creditor, that the rights of other parties intervene, the creditor has his remedy against the officer.⁵ In an action against a sheriff for failing to make the money on an execution, the damages are not necessarily the amount of the execution, but only such damages as the plaintiff actually suffers by the sheriff's neglect.⁶

¹ *Beveridge v. Wagner*, 48 Ill. 525.

⁴ *McElhanon v. Co. Court*, 54 Ill.

² 1 Swan's Prac. 368, h.

163.

³ *Sutherland v. Phelps*, 22 Ill. 92.

⁵ *Davidson v. Waldron*, 31 Ill. 120.

⁶ *French v. Snyder*, 30 Ill. 339.

Where a sheriff accepts an assignment of a chattel mortgage as collateral security for the payment of a judgment, upon which he has an execution in his hands, the plaintiff in execution, being ignorant of the assignment, is not bound by the action of the sheriff. The latter can only accept money in satisfaction of an execution.¹

An officer having an execution must use due diligence to make the amount thereof out of the property of the defendant in his county.² In determining the amount of property necessary to be taken to satisfy an execution, the officer should make an allowance for the sacrifice usually incident to forced sales. And in an action against a sheriff for failing to collect the amount of an execution, it is no defense that the sheriff had reasonable grounds to believe, and did believe, that he had seized sufficient property. He must be able to show that he used such diligence as prudent men use in the management of their own business. And while he ought to take property enough, at the same time he should not make a seizure so excessive as to bear on its face the appearance of oppression and unnecessary rigor.³

An officer who should refuse to proceed upon a second execution, where the first had been stayed by an agreement between the parties to it, would be liable for a false return.⁴ A failure by a sheriff to return an execution within the time prescribed by law is a breach of his bond.⁵

A fee-bill is "process," and has the effect of an execution;⁶ and if an officer neglects to return such process within ninety days from its date, he becomes liable to pay the amount of the same.⁷ The right of action of a judgment creditor against a

¹ *Dibble v. Briggs*, 28 Ill. 48.

² *Dunlap v. Berry*, 4 Scam. 331; *Hargrave v. Penrod*, Breese 401; *Davidson v. Waldron*, 31 Ill. 120; *Beveridge v. Wagner*, 48 Ill. 525.

³ *French v. Snyder*, 30 Ill. 339; *Mitchell v. Commonwealth*, 37 Penn. State R. 187; *Sheldon v. Paine*, 10 N. Y. (6 Selden) 398; *Taylor v. Commonwealth*, 3 Bibb 359; *Wickliffe v. Sanders*, 7 B. Mon. 298; *Lawson v. State*, 5 Eng. (Ark.) 28.

⁴ *Hargrave v. Penrod*, Breese 401; *Ross v. Weber*, 26 Ill. 221; *Moore v. Fitz*, 15 Ind. 43; see *Davidson v. Waldron*, 31 Ill. 120.

⁵ *People v. Johnson*, 15 Ill. App. 153.

⁶ *Reddick v. Cloud*, 2 Gilm. 670; *Ferris v. Crow*, 5 Gilm. 96; *Newkirk v. Chapron*, 17 Ill. 344.

⁷ *People v. Nichols*, 4 Scam. 560; *Shippen v. Curry*, 3 Met. (Ky.) 184; *Crow v. State*, 24 Texas, 12.

sheriff for not levying a *fi. fa.* is not taken away by a discharge of the debtor by the creditor from a *ca. sa.* issued at his instance (although such a discharge might be a satisfaction of the judgment), where the creditor's right of action against the sheriff was perfect before such discharge.¹ It has been held that the levy of an execution against one upon the property of another, is a breach of a sheriff's bond.² On the subject of the liability of sheriffs, see the additional Illinois cases noted below.³

No. 247. On a guardian's bond—For the use of the ward, after coming of age.

(Commence as in last precedent.) For that whereas in the — term, in the year 18—, of the county court of the county aforesaid, to wit, on, etc., in that year, the said A. B., then a minor above the age of fourteen years, personally appeared before that court, and made choice of the said C. D. as his guardian; and thereupon the said C. D. was by the same court then and there approved and appointed as guardian of the person and estate of the said A. B.; and the same court then and there took and approved a bond of the said C. D., with the said E. F. and G. H. as two sufficient sureties, in double the amount of the personal estate of the said A. B., and six times the amount of the gross annual income of his real estate, according to the form of the statute, etc.: And on that occasion they, the said C. D., E. F. and G. H., defendants, then and there, by their writing obligatory, bearing date of that day, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of — dollars above demanded, to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said C. D. should faithfully discharge the office and trust of such guardian of the said A. B., according to law, and should make a true inventory of all the real and personal estate of the said A. B. that should come to the possession or knowledge of the said C. D., and return the same unto the said county court, at the time required by law, and should manage and dispose of all such estate according to law and for the best interest of the said A. B., and should faithfully discharge his, the said C. D.'s

¹ *Hargrave v. Penrod*, Breese 401.

² *Jones v. People*, 19 Ill. App. 301;
Hill v. Reitz, 24 Ill. App. 391.

³ *People v. Nichols*, 4 Scam. 560;
People v. McKatton, 2 Gilm. 731;
Buckmaster v. Drake, 5 Gilm. 321;
Day v. Hackney, 20 Ill. 133; *People v. Wardlaw*, 24 Ill. 570; *People v. Palmer*, 46 Ill. 398; *Smart v. Carson*,

50 Ill. 195; *People v. Foster*, 133 Ill.

521; *Klemm v. Bishop*, 56 Ill. App. 613; *Bressler v. Beach*, 21 Ill. App.

422; *Bank v. Hanchett*, 126 Ill.

499; *People v. Hanchett*, 111 Ill. 93;

Boyd v. Frank, 20 Ill. App. 169;

McGillis v. Bishop, 27 Ill. App. 53;

Comer v. Huston, 55 Ill. App. 153;

Green v. People, 14 Bradw. 364.

trust in relation thereto and to the custody, nurture and education of the said A. B., and should render an account on oath of the property in the hands of him, the said C. D., including the proceeds of all real estate that might be sold by him, if any, and of the management and disposition of all such estate, within one year after his said appointment, and at such other time as should be required by law or directed by the court, and upon his removal from office, or at the expiration of his said trust, should settle his accounts in that court, or with the said A. B. or his legal representatives, and pay over and deliver all the estate, title papers and effects remaining in his, the said C. D.'s, hands, or due from him on such settlement, to the person or persons lawfully entitled thereto, then the said writing obligatory should be void, and otherwise should remain in full force and virtue; as by the said writing obligatory and the said condition thereof, remaining affixed in the said county court, will appear: (*) And thereupon the said C. D. then and there took upon himself the said office and trust of guardian of the said A. B., and thenceforth was such guardian until the — day of, etc., when the said A. B. attained his age of twenty-one years. Yet the plaintiff in fact says that the said C. D. did not faithfully discharge the said office and trust of guardian of the said A. B. according to law, but neglected and refused so to do, to the injury of the said A. B. And for assigning a breach of the said condition of the said writing obligatory, the plaintiff says, that after the said appointment of the said C. D. as such guardian and the making of the said writing obligatory, as aforesaid, and before the day last mentioned, divers rents accruing from the real estate of the said A. B., amounting to a large sum of money, to wit, — dollars, came to the hands of the said C. D. as such guardian; yet the said C. D., not regarding his duty as such guardian, during that time there converted and disposed of the said rents to his own use, and has neglected and refused, and still neglects and refuses to pay over to the said A. B. the amount of the said rents, or any part thereof, although he, the said A. B., on the day last aforesaid, was there lawfully entitled thereto, and the said C. D. was then and there requested to pay over the same to him, the said A. B. And for assigning a further breach of the said condition of the said writing obligatory, the plaintiff says, that (*here set out any other act or omission constituting a breach of the condition of the bond.*) By means of which premises an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the said sum of — dollars above demanded: Yet the defendants, though requested, have not paid to the plaintiff that sum of money, or any part thereof, but refuse so to do; to the damage of the plaintiff, for the use aforesaid, of — dollars, and therefore, for the use aforesaid, the plaintiff brings suit, etc.

It is suggested that the declaration might be somewhat more concisely framed, as follows:

For that whereas the defendants, on, etc., in, etc., by their writing obligatory, bearing date of that day, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of

— dollars above demanded, to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said C. D., who had been appointed guardian of the said A. B., should faithfully discharge the office and trust, etc. (*setting out the condition, as in the above precedent*); as by the said writing obligatory and the said condition thereof, remaining affixed in the same court, will appear. And although the said C. D. then and there took upon himself the said office and trust of guardian of the said A. B., as in the said condition mentioned, and thenceforth was such guardian until the — day of, etc., when the said A. B. became of full age, nevertheless the plaintiff in fact says, that the said C. D. did not faithfully discharge his said office and trust, etc. (*Proceeding as in the above precedent*.)

An allegation in a declaration on a guardian's bond of a settlement of the guardian's accounts in the probate court, and a failure, neglect and refusal to pay over to the ward the amount found to be due by that court, is a sufficient assignment of a breach of the condition that the guardian shall faithfully discharge the office and trust imposed upon him according to law; and the breach of that condition furnishes as ample a basis for a recovery as would a breach of any of the other conditions of the bond.¹

No. 248. *On a guardian's bond—For the use of the successor of a guardian who has been removed.*

(*Title of court, etc., as in No. 234, ante.*) The People of the State of Illinois, plaintiff, which sues in this behalf for the use of J. K., complains of C. D., E. F. and G. H., defendants, of a plea that they render to the plaintiff, for the use aforesaid, the sum of — dollars, which they owe to and unjustly detain from the plaintiff. For that whereas in the — term, in the year 18—, of the county court of the county aforesaid, to wit, on, etc., in that year, one A. B. (*proceed as in No. 247, to the asterisk*): And thereupon the said C. D. then and there took upon himself the said office and trust of guardian of the said A. B., and thenceforth was such guardian until the — day of, etc., when he, the said C. D., was by the same court removed from his said office and trust, and the said J. K. was duly appointed and qualified, and thenceforth has been, and still is, guardian of the person and estate of the said A. B. And the plaintiff in fact says, that the said C. D. did not faithfully discharge the said office and trust of guardian of the said A. B., according to law, but neglected and refused so to do, to the injury of the said J. K. And for assigning a breach of the said condition of the said writing obligatory, the plaintiff says, that (*here set out any particular act or omission constituting a breach*). And for assigning a further breach of the said condition of the said writing obligatory, the plaintiff says, that

¹ *People v. Seelye*, 146 Ill. 189.

(here set out any other breach). By reason of which said breaches the said writing obligatory became forfeited, and thereby an action has accrued, etc. (concluding as in No. 247).

In the case of *Bond v. Lockwood*, 33 Ill. 212 (1864), the court says that the statute in relation to guardians does not constitute a complete code, but confers upon the county court power to appoint guardians, and to regulate their conduct in accordance with their duties at common law. Many of the powers and duties, rights and liabilities of guardians are not specifically defined by the statute. It contains such provisions as were necessary to define the nature of the jurisdiction conferred, prescribe the manner of its exercise, and correct some of the defects of the law as it then existed. In other respects the common law is left in force.

See the same case for a discussion of the powers, rights, duties and liabilities of guardians.

If a guardian buys land with the ward's money, the ward may elect to take the land, or consider it as a security for the money.¹

Where a guardian converts the money of his ward to his own use, suit may be at once instituted on the bond. It is not necessary to a recovery that a *devastavit* shall have previously been established against him.²

It is held that if a guardian converts money of his ward to his own use, he is chargeable with compound interest.³ In Illinois, by statute, a guardian is chargeable with interest upon any money which he wrongfully or negligently allows to remain in his hands uninvested after the same might have been invested.⁴

Guardianship of a female ward determines on her marriage;

¹ *Edmonds v. Morrison*, 5 Dana 223; *Davies v. Lowrey*, 15 Ohio 655.

² Rev. Stat. (1893) 1005; Rev. Stat. (1895) 1073; 2 Starr & Curtis 1687; *Bonham v. People*, 102 Ill. 434; *Gillett v. Wiley*, 126 Ill. 319; *McIntire v. People*, 103 Ill. 142.

³ *Rowan v. Kirkpatrick*, 14 Ill. 1; *Jennison v. Hapgood*, 10 Pick. 78; *Moore v. Beauchup*, 5 Dana 77; 1

Am. Lead. Cas., 362; *Bond v. Lockwood*, 33 Ill. 212; *In re Steele*, 65 Ill. 322.

⁴ Rev. Stat. (1895), 841; Rev. Stat. (1893), 792; 1 Starr & Curtis 1243; see *Bennett v. Hanifan*, 87 Ill. 31; *Winslow v. People*, 117 Ill. 152; *Kattelman v. Guthrie*, 142 Ill. 357; *Rawson v. Corbett*, 150 Ill. 466.

otherwise of males.¹ By the statute of Illinois, the marriage of a female ward discharges her guardian from all right to her custody and education, but not to her property.²

See the statute of Illinois concerning guardians and wards, and the additional cases noted below.³

No. 249. On an administrator's bond.

(Commence as in No. 246, ante.) For that whereas in the — term, in the year 18—, of the county court of the county aforesaid, to wit, on, etc., in that year, the said C. D. was by the same court appointed administrator of the estate of one J. K., deceased, and was then and there duly qualified as such administrator; and the said C. D. then and there entered into bond, with the said E. F. and G. H. as two sufficient sureties, in double the value of the said estate, according to the form of the statute, etc.: And on that occasion the defendants then and there, by their writing obligatory, bearing date of that day, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the penal sum of —, current

¹ 1 Ves. Sen. 159, n.

² Rev. Stat. (1895), 843; Rev. Stat. (1893), 794; 1 Starr & Curtis 1248.

³ Starr & Curtis 1236; Rev. Stat. (1895), 839; *Mason v. Wait*, 4 Scam. 127; *Davis v. Harkness*, 1 Gilm. 173; *Cowls v. Cowls*, 3 Gilm. 435; *Mason v. Caldwell*, 5 Gilm. 196; *Young v. Lorain*, 11 Ill. 625; *Young v. Keough*, 11 Ill. 642; *Holmes v. Field*, 12 Ill. 424; *Cochran v. McDowell*, 15 Ill. 10; *Clark v. Burnside*, 15 Ill. 62; *King v. King*, 15 Ill. 187; *Ayers v. Baumgarten*, 15 Ill. 444; *Young v. Dowling*, 15 Ill. 481; *Penn v. Heisey*, 19 Ill. 295; *In re Guernsey*, 21 Ill. 443; *Lloyd v. Malone*, 23 Ill. 43; *Smith v. Race*, 27 Ill. 387; *Fitzgibbon v. Lake*, 29 Ill. 165; *Cummins v. Cummins*, 29 Ill. 452; *Gilbert v. Guptill*, 34 Ill. 112; *Merritt v. Simpson*, 41 Ill. 391; *Campbell v. Harmon*, 43 Ill. 18; *Mulford v. Stalzenback*, 46 Ill. 303; *Clark v. Thompson*, 47 Ill. 25; *Mortimer v. People*, 49 Ill. 473; *Attridge v. Billings*, 57 Ill. 489; *McElheny v. Musick*, 63 Ill. 328; *Morgan v. Johnson*, 68 Ill. 190; *Meyers v. Temme*, 72 Ill. 574; *Mulford v. Beveridge*, 78

Ill. 455; *Sperry v. Fanning*, 80 Ill. 371; *Bruce v. Doolittle*, 81 Ill. 103; *People v. Harrison*, 82 Ill. 84; *Harvey v. Harvey*, 87 Ill. 54; *Railsback v. Williamson*, 88 Ill. 494; *Bell v. People*, 94 Ill. 230; *Fogarty v. Ream*, 100 Ill. 366; *Hughes v. People*, 111 Ill. 460; *Lloyd v. Kirkwood*, 112 Ill. 338; *Bailey v. Bailey*, 115 Ill. 553; *Millard v. Harris*, 119 Ill. 190; *Carter v. Tice*, 120 Ill. 281; *Yates v. Dodge*, 123 Ill. 52; *In re Corrington*, 124 Ill. 363; *Nichols v. Sargent*, 125 Ill. 311; *Hayes v. Ins. Co.*, 125 Ill. 262; *Roodhouse v. Roodhouse*, 132 Ill. 362; *Kingsberry v. Powers*, 131 Ill. 191; *Kingsberry v. Hutton*, 140 Ill. 603; *Ames v. Ames*, 148 Ill. 321; *Hughes v. People*, 10 Bradw. 148; *Henning v. Eldridge*, 14 Ill. 191; *Wright v. Comley*, 14 Bradw. 551; *Means v. Earles*, 15 Bradw. 273; *Seago v. People*, 21 Ill. App. 283; *People v. Borders*, 31 Ill. App. 431; *Cond. v. Churchman*, 32 Ill. App. 318; *Steyer v. Morris*, 39 Ill. App. 387; *Zander v. Feeley*, 47 Ill. App. 659.

money of the United States, to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said C. D., administrator of all and singular the goods and chattels, rights and credits of the said J. K., deceased, should make or cause to be made a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased which should come to the hands, possession or knowledge of him, the said C. D., as such administrator, or to the hands of any person or persons for him, and the same so made should exhibit or cause to be exhibited in the said county court, agreeably to law, and such goods and chattels, rights and credits should well and truly administer according to law, and all the rest of the said goods and chattels, rights and credits which should be found remaining upon the account of the said administrator, the same being first examined and allowed by the court, should deliver and pay unto such person or persons respectively as might be legally entitled thereto, and further should make a just and true account of all his actings and doings therein when thereunto required by the same court, and if it should appear that any last will and testament was made by the said deceased, and the same should be proved in court, and letters testamentary or of administration be obtained thereon, the said C. D. in such case, on being required thereto, should render and deliver up the letters of administration granted to him as aforesaid, and should, in general, do and perform all other acts which might at any time be required of him by law, then the said obligation was to be void, and otherwise to remain in full force and virtue; as by the said writing obligatory and the said condition thereof, remaining affixed in the same court, will appear.

And thereupon the said C. D. then and there took upon himself the administration of the said estate, and thenceforth has been, and still is, such administrator as aforesaid. Yet the plaintiff in fact says, that the said C. D. has not faithfully discharged the duties of his said office of administrator, according to the said condition of the said writing obligatory, but has neglected and refused so to do, to the injury of the said A. B. And for assigning a breach of the said condition, the plaintiff says that heretofore, in the — term, in the year 18—, of the said county court, to wit, on, etc., in that year, by the consideration of the same court the said A. B. recovered against the said estate of the said J. K., deceased, the sum of — dollars, to be paid in due course of administration, as a debt of the — class; (*) and although at and since that time divers moneys and effects belonging to the said estate were and have been in the hands of the said C. D. as such administrator, out of which moneys and effects the amount of the said judgment might and ought to have been paid to the said A. B., yet the said C. D. has not paid the same, or any part thereof, to the said A. B., but has wasted the said moneys and effects, and converted and disposed of the same to his, the said C. D.'s, own use. And for assigning a further breach of the said condition of the said writing obligatory, the plaintiff says, that (*here set out any other matter constituting a breach, as that the administrator did not make and exhibit an inventory, etc.*) By means of which premises the said writing obligatory has become forfeited, and thereby an action has accrued, etc. (*concluding as in No. 247, ante*).

The matters of inducement might perhaps be omitted, and the declaration proceed directly to a statement of the bond and condition, as suggested under form No. 247, *ante*; after which the declaration might proceed:

"And, although the said C. D. thereupon then and there took upon himself the administration of the said estate, as in the said condition mentioned, and thenceforth has been, and still is, such administrator as aforesaid, nevertheless the plaintiff in fact says, that the said C. D. has not faithfully discharged his duties as such administrator, according to the said condition, but has neglected and refused so to do, to the injury," etc.

Section 115 of the statute provides that "if any executor or administrator shall fail or refuse to pay over any moneys or dividend to any person entitled thereto, in pursuance of the order of the county court, lawfully made, within thirty days after demand made for such moneys or dividend, the court, upon application, may attach such delinquent executor or administrator; * * * and moreover, such failure or refusal on the part of such executor or administrator shall be deemed and taken in law to amount to a *devastavit*, and an action upon such executor's or administrator's bond and against his securities, may be forthwith instituted and maintained, and the failure aforesaid to pay such moneys or dividend shall be a sufficient breach to authorize a recovery thereon."

In a proceeding under sec. 115, chap. 3, R. S., entitled "Administration," against a defaulting executor or administrator, it is necessary to aver and prove a demand. It is not necessary, however, to do so when proceeding under section 39 of that chapter.¹

It has been held that an action will lie upon an administrator's bond for a *devastavit*, by a creditor who has obtained a judgment against the administrator in a court of competent jurisdiction, notwithstanding the claim was never presented to the probate court.²

It is not essential to a right of recovery that a *devastavit* shall have first been established against the administrator.

¹ 1 Starr & Curtis, 244; Rev. Stat. (1893), 128; Rev. Stat. (1895), 128; *People v. Stacy*, 11 Bradw. 506.

² *Nevitt v. Woodburn*, 56 Ill. App. 346.

³ *People v. Allen*, 8 Bradw. 17.

Since the case of *Briggs v. Postlewaite*, Breese 198, a statute has been passed which dispenses with proof of a *devastavit*, in all actions on bonds of executors and administrators.¹ A *devastavit* may be alleged in the following manner—proceeding thus from the asterisk in the above form :

And the said judgment still remaining wholly unsatisfied, the said A. B. afterward impleaded the said C. D. in the said — court, to the — term thereof, in the *same* year, and declared against him in a plea of debt, alleging the said judgment; and in and by his declaration in that behalf the said A. B. averred, that at the time of the recovery aforesaid divers goods, chattels and moneys which were of the said J. K., at the time of his death, of great value, to wit, of the value of the sum of money so recovered as aforesaid, had come to the hands of the said C. D., as administrator as aforesaid, to be administered, which said goods, chattels and moneys the said C. D. afterward, to wit, on, etc., there eloiigned, wasted, and disposed of and converted to his own use, etc.; and such proceedings were thereupon had in that plea, that in the *same* term, to wit, on etc., by the consideration of the same court the said A. B. recovered against the said C. D. as well the said sum of — dollars, the debt in that plea demanded, as the further sum of — dollars, damages for the detaining of that debt, and the costs of the said A. B. in that behalf, taxed at the sum of — dollars; and the same debt, damages and costs still remain wholly unpaid to him, the said A. B. By means of which premises, etc.

A failure to collect debts which might be collected is waste by an administrator, and he is chargeable with the loss.² An averment that the administrator has not complied with an order of the county court directing the payment of a claim against the estate, is a sufficient averment that the money ordered to be paid had not, in fact, been paid to the party entitled to the same.³

In an action upon an administrator's bond, at the instance of a creditor, a right of recovery exists, *prima facie*, if it appears that the person for whose use the suit is brought holds a claim against the estate, and that the administrator has been guilty of a *devastavit* to the extent of such claim. It is not essential to such right of recovery that the creditor should prove there were no assets to which he could resort for the satisfaction of his claim. Even if it should appear that there

¹ Rev. Stat. (1893), 1005; Rev. Stat. (1895), 1073; 2 Starr & Curtis, 1687; *Tucker v. People*, 87 Ill. 76.

² Am. & Eng. Enc. Law, vol. 7, page 347, and cases there cited.

³ *Tucker v. People*, 87 Ill. 76.

were assets sufficient to satisfy the creditor, the right of recovery on the bond would perhaps not thereby be defeated. (54 Ill. 263.) This case was decided before the passage of the act of 1872, above mentioned.

Creditors, heirs and distributees only, and not an administrator *de bonis non*, can charge a former administrator with a *devastavit*.¹

In *Ralston v. Wood*, 15 Ill. 159, the court says that a suit upon an administrator's bond, for a failure by the administrator to pay over money adjudged by a probate court to be paid, is a collateral action, founded as well upon that judgment as upon the bond; and in such action the judgment can not be inquired into by those affected by it—neither by the administrator nor his sureties—except for fraud.²

For a breach of the condition of the bond of an executor or administrator, an action may, in Illinois, be maintained against any one or more of the obligors;³ and the bond may be described as the bond of those of the obligors who are sued, without noticing the others.⁴

The statute in that regard is as follows: "All bonds which may at any time be given by any executor or administrator, either with or without the will annexed, or *de bonis non*, to collect, or public administrator, may be put in suit and prosecuted against all or any one or more of the obligors named therein, in the name of the people of the State of Illinois, for the use of any person who may have been injured by reason of the neglect or improper conduct of any such executor or administrator, and such bonds shall not become void on the first recovery thereon, but may be sued upon, from time to time, until the whole penalty shall be recovered: *Provided*, that the person for whose use the same is prosecuted shall be liable for all costs which may accrue in the prosecution of the same in

¹*Rowan v. Kirkpatrick*, 14 Ill. 8; *Newhall v. Turney*, 14 Ill. 338; *Short v. Johnson*, 25 Ill. 489; *Stose v. People*, 25 Ill. 600; see *Dwight v. Newell*, 15 Ill. 333; *Duffin v. Abbott*, 48 Ill. 17.

² See also *Housh v. People*, 66 Ill.

179; *Brooks v. People*, 15 Ill. App. 570; *Rutter v. Hall*, 31 Ill. App. 647; *People v. Stacy*, 11 Bradw. 506.

³ *People v. Miller*, 1 Scam. 83; *People v. Lott*, 27 Ill. 215.

⁴ *Curry v. People*, 54 Ill. 263; *Cummings v. People*, 50 Ill. 132.

case the plaintiffs fail in their suit; and certified copies of all such bonds, under the seal of the clerk of the county court, shall be received as evidence to authorize such recovery in any court of law or equity of competent jurisdiction.”¹

The adjudged cases in Illinois, relating to executors and administrators, are very numerous, almost every volume of the reports containing one or more cases of this kind.

No. 250. On an attachment bond (given in a suit in the same court).

(*Title of court, etc., as in No. 234, ante.*) A. B., plaintiff, by L. M., his attorney, complains of C. D., E. F. and G. H., defendants, of a plea that they render to the said A. B. the sum of — dollars, which they owe to and unjustly detain from him: For that whereas the said C. D., on, etc., in, etc., prayed a writ of attachment out of the said — court of the said county, against the estate of the said A. B.; and on that occasion the said C. D., E. F. and G. H. then and there, by their writing obligatory, bearing date of that day, did jointly and severally acknowledge themselves to be held and firmly bound unto the said A. B. in the sum of — dollars, to be paid to him, the said A. B.; which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect that the said C. D. had on the day aforesaid prayed an attachment out of the said court, at the suit of himself, against the estate of the said A. B., for the sum of — dollars, which attachment was then about to be sued out of the said court, returnable on the — day of — then next, to the term of the said court then to be holden, it was provided that if the said C. D. should prosecute his said suit with effect, or in case of failure therein should well and truly pay and satisfy the said A. B. all such costs in the said suit, and such damages as should be awarded against the said C. D., his heirs, executors or administrators, in any suit or suits which might thereafter be brought for wrongfully suing out the said attachment, then the said writing obligatory was to be void, otherwise to remain in full force and effect; as by the said writing obligatory and the said condition thereof, remaining affixed in the said court, will appear:

And thereupon, on the day first aforesaid, there issued from the said court the writ of attachment aforesaid, returnable as in the said condition mentioned, by which said writ the people of the said State of Illinois commanded the sheriff of the said county that he should attach so much of the estate, real or personal, of the said A. B., to be found in the said county, as should be of value sufficient to satisfy the said debt and the costs, according to the complaint in that behalf, and such estate so attached in his, the said sheriff's, hands to secure, or so to provide that the same might be liable to further proceedings thereupon, according to law, etc.: And thereupon

¹ Rev. Stat. (1895) 113; Rev. Stat. *People v. Lott*, 27 Ill. 215; *People* (1893) 113; 1 Starr & Curtis 203; *v. Summers*, 16 Ill. 173. *People v. Randolph*, 24 Ill. 325; see

the said sheriff, to whom the said writ was then and there delivered for execution, by virtue of the said writ then and there attached and took divers goods and chattels of the said A. B., of the value of — dollars. And the said A. B. in fact says, that the said C. D. did not prosecute his said suit with effect, but that such proceedings were thereupon had in that suit that afterwards, in the *said* — term of the said court, to wit, on, etc., it was considered by the said court that the said writ should be quashed, and that the said A. B. should recover his costs in that behalf against the said C. D.; which said costs were and are taxed in the said court at the sum of — dollars, and still remain unpaid to him, the said A. B. And the said A. B. further in fact says, that by reason of the wrongful suing out of the said writ he was there obliged to and did expend divers sums of money, amounting to — dollars, in and about his defense of that suit, and has thereby sustained damage to that amount; yet the said C. D. (although he was on the day last aforesaid there requested by the said A. B. so to do) has not paid to him, the said A. B., the last mentioned sum of money, or any part of the same. By means of which premises an action has accrued to the said A. B. to demand of the said C. D., E. F. and G. H. the said sum of — dollars above demanded: Yet though requested, they have not paid to the said A. B. that sum of money, or any part thereof, but refuse so to do; to the damage of the said A. B. of — dollars, and therefore he brings his suit, etc.

From the wording of the condition of the bond prescribed by the 5th section of the Illinois attachment act, and from the 4th section of the same act, it would seem that the obligors would only be liable for such damages as might be awarded against the principal in any suit which might afterward be brought *against him* for wrongfully suing out the writ—that is, if the defendant in the attachment suit should, in an action brought by him, recover damages against the principal for wrongfully suing out the attachment, and the latter should not pay such damages, then the obligors would be liable on their bond. But in the case of *Churchill v. Abraham*, 22 Ill. 455, the court says: “It has never been held that the obligee could not recover the amount of the damages actually sustained by the wrongful suing out of the attachment, until he has brought an action for maliciously suing out the writ, and recovered a judgment for the damages sustained. Our statute intends to afford a remedy to the defendant in attachment, if the attachment is not sustained, although it may have been sued out in good faith, and upon probable cause. If the party could only sue upon the bond after he had recovered a

judgment for a malicious attachment, he might sustain the most serious loss by the wrongful act of the plaintiff even when it was not malicious. The plaintiff in attachment can not excuse himself because he acted in good faith. If he occasions damages by an attachment which he can not sustain, he and his sureties should and must be responsible for those damages. Although the wording of the bond, as prescribed by the statute, does not express the liability in language as clear as might have been selected, its meaning has been long and well settled in this state, and we should not, were the language even more doubtful, feel at liberty to disturb it."¹

Although the goods may have been sold under an execution after they were seized under the attachment, that does not alter the measure of the liability arising by reason of the wrongful suing out of the attachment.²

A proceeding in attachment was held invalid by reason of the insufficiency of the bond, which described no court from which the writ issued, nor any court or term to which it was to be returned; and the court said the bond was so wholly uncertain that it might well be doubted whether an action could ever be maintained on it, in case of a breach of its condition.³ In another case, where the only mention of the court, in the bond, was in the condition, wherein the writ was described as "returnable on the 2d day of November next, to the term of the court then to be holden," the bond was held sufficient, as it complied with the form given by the statute then in force.⁴

Where the condition of an attachment bond recited that A. and B. had prayed an attachment at the suit of C., to their use, and provided that if A. and B. should prosecute their suit, etc.—following the form given in the 5th section of the Illinois attachment act—the bond was held sufficient, although the 4th section of the act requires the bond to be "conditioned for satisfying all costs which may be awarded to such defendant, or to any others interested in said proceedings."⁵

¹ See *Hibbard v. McKindley*, 28 Ill. 240; *Bliss v. Heasty*, 61 Ill. 338; *Packer v. Phillips*, 33 Ill. App. 120.

² *Churchill v. Abraham*, 22 Ill. 455.

³ *Lawrence v. Yeatman*, 2 Scam. 15.

⁴ *Singleton v. Wofford*, 3 Scam. 576.

⁵ *Love v. Fairfield*, 5 Gilm. 303;

It has been held that the measure of damages to be recovered on an attachment bond is the actual expenses and loss resulting from the attachment, including fees for professional services rendered in relation to the attachment.¹

No. 251. On an injunction bond (given in a suit in the same court).

(Commence as in the last precedent.) For that whereas on, etc., the said C. D. exhibited in the said circuit court of the county aforesaid, on the chancery side thereof, his bill of complaint against the said A. B., and thereby prayed, *amongst other things*, that the said A. B. might be enjoined from doing certain acts in the said bill mentioned; and upon examination hereof, *the judge of* the said court then and there ordered that a writ of injunction should issue, according to the prayer of the said bill, upon the said C. D.'s giving bond, conditioned according to law, (*or* "as required by the said order,") with the said E. F. and G. H. as sureties: And thereupon, in pursuance of the said order, the said C. D. gave bond, with the said E. F. and G. H. as sureties therein as aforesaid; and on that occasion they, the said C. D., E. F. and G. H., by their writing obligatory, bearing date of that day, jointly and severally acknowledged themselves to be held and firmly bound unto the said A. B. in the sum of — dollars above demanded, to be paid to him, the said A. B., upon the condition, nevertheless, that if the said C. D. should well and truly pay to the said A. B. all such costs and damages as should be awarded against him, the said C. D., in case the said injunction should be dissolved, then the said writing obligatory was to be void, and otherwise to remain in full force; as by the said writing obligatory, remaining affiled in the said court, will more fully appear. (*) And thereupon there issued then and there, from the said court, a writ of injunction in that behalf, whereby the people of the State of Illinois commanded and strictly enjoined the said A. B. that he should absolutely desist and refrain from doing the acts therein and in the said bill mentioned, until the further order of the said court in the premises; which said writ was then and there directed and delivered to the sheriff of the county aforesaid to be executed, and to be by him returned into the said court at the then next term thereof, in due form of law: And thereupon the said sheriff, on the day first aforesaid, there duly served the said writ on the said A. B., by delivering to him a true copy of the same. And the said A. B. in fact says, that such proceedings were thereupon had in that cause that afterwards in the — term of the said court, in the year 18—, to wit, on, etc., in that year, it was adjudged and decreed by the said court that the said injunction should be dissolved, and that the said C. D. should pay to the said A. B. his costs in that behalf, which said costs were and are taxed in the said court at the sum of — dollars, and should pay to him, the said A. B., the sum of — dollars, which by the said court was then and there adjudged to him for his damages by him in that behalf sustained: Nevertheless the said C.

D. has not paid to the said A. B. the costs and damages aforesaid, or any part thereof, but the same remain wholly unpaid. Whereby an action has accrued to the said A. B. to demand of the said C. D., E. F. and G. H. the said sum of — dollars above demanded: Yet they have not paid to the said A. B. that sum of money, or any part thereof, but refuse so to do; to the damage of the said A. B. of — dollars, and therefore he brings his suit, etc.

Section 12 of the injunction act, provides that "in all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting in writing the nature and amount thereof, shall hear evidence, and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same, *provided*, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."¹

Damages may be assessed either on the dissolution of the injunction, or in a suit on the bond.² And a failure to assess damages on the dissolution is no bar to an action on the injunction bond therefor.³

A recovery in an action on the bond is an award of damages within the usual conditions of such bonds. And it is not necessary that a separate recovery should be had against the complainant before the liability attaches against the securities. When a judgment is recovered against him and the other obligors, the condition is answered, as the damages are then awarded against him.⁴

The act of 1861 was the same as the above section with the

¹ 1 Starr & Curtis 1285; Rev. Stat. (1895) 859; Rev. Stat. (1893) 810; *Hibbard v. McKindley*, 28 Ill. 240; *Brown v. Gorton*, 31 Ill. 416; *Misner v. Bullard*, 43 Ill. 470; *Buck v. Beekly*, 45 Ill. 100; *Sturges v. Hart*, 45 Ill. 103; *Hartwell v. Black*, 48 Ill. 301; *Shaffer v. Sutton*, 49 Ill. 506; *Smith v. Powell*, 50 Ill. 21; *Collins v. Sinclair*, 51 Ill. 328; *Fahs v. Roberts*, 54 Ill. 192; *Forth v. Xenia*, 54

Ill. 210; *Wing v. Dodge*, 80 Ill. 564; *Spring v. Collector*, 78 Ill. 101; *Marsh v. Morton*, 75 Ill. 621.

² *Bardill v. Trustees*, 4 Bradw. 94; *Rees v. Peltzer*, 1 Bradw. 315.

³ *Linington v. Strong*, 8 Bradw. 384.

⁴ *Hibbard v. McKindley*, 28 Ill. 240; *Brown v. Gorton*, 31 Ill. 416; *Sturges v. Hart*, 45 Ill. 103.

exception of the *proviso*. In the revision of 1874, that act was amended by adding, "*Provided*, a failure to assess damages shall not operate as a bar to an action upon the injunction bond." Under the act of 1861, it was held that unless the obligees had their damages assessed upon the dissolution they could not have them assessed in a suit on the bond.¹

If the damages were not assessed on dissolution, the declaration may proceed, from the asterisk in the above form, in this manner :

And thereupon there issued then and there, from the said court, a writ of injunction in that behalf, whereby the people of the said State of Illinois commanded and strictly enjoined the said A. B. that he should absolutely desist and refrain from removing, selling, or in any manner disposing of or interfering with a certain stock of dry goods and groceries then in a certain store house then occupied by the said A. B., in the town of —, in the county aforesaid, until the further order of the said court in the premises; which said writ was then and there directed and delivered to the sheriff of the county aforesaid to be executed, and to be by him returned into the said court, at the then next term thereof, in due form of law. And thereupon the said sheriff, on the day first aforesaid, there duly served the said writ on the said A. B., by delivering to him a true copy of the same. And the said A. B. in fact says, that such proceedings were thereupon had in that cause that afterwards, in the — term of the said court, in the year 18—, to wit, on, etc.. in that year, it was adjudged and decreed by the said court that the said injunction should be dissolved, and that the said C. D. should pay to the said A. B. his costs in that behalf; which said costs were and are taxed in the said court at the sum of — dollars, and still remain wholly unpaid to the said A. B. And the said A. B. further in fact says, that by reason of the said injunction he was, during all the time the same remained in force as aforesaid, there prevented from merchandising and making profit of the said stock of dry goods and groceries (whereof he was then the owner. and which was, at the time of the issuing of the said writ, of the value of — dollars), and from carrying on his business of a merchant, and thereby he, the said A. B., there lost and was deprived of great gains and profits which he otherwise would have made, amounting to the sum of — dollars; and also, during the time the said injunction remained in force as aforesaid, the said A. B. was there compelled to and did pay out and expend divers sums of money, amounting to the sum of — dollars, for rent of the store house above mentioned, and for other expenses of his said business, without deriving any benefit therefrom; and also, by reason of the said injunction, the said A. B. was there compelled to and did pay out and expend divers sums of money, amounting to the sum of —

¹ *Russell v. Rogers*, 56 Ill. 176; *Brownfield v. Brownfield*, 58 Ill. 152; *Alwood v. Mansfield*, 81 Ill. 314.

dollars, for the fees and charges of solicitors and counsel, and for other charges and expenses, in and about his defense in that behalf; and also, (*any other special damage may be here alleged in like manner*): by means of which premises the said A. B. has sustained damages to the amount of — dollars, and the said damages remain wholly unpaid to him, the said A. B. Whereby an action has accrued, etc. (*concluding as in the above precedent*).

The act of 1861 does not repeal the act of 1845, but provides for cases not embraced within the last named act. Upon the dissolution of an injunction "to stop the collection of a judgment at law," the assessment of damages is governed by the act of 1845, and no suggestion of damages is necessary. The extent of the liability, in such a case, appears on the face of the bond.¹

But an injunction to restrain the sale of certain property, on grounds entirely independent of the validity of the judgment, is not an injunction against the judgment.² And upon the dissolution of an injunction to restrain an incorporated town from instituting and prosecuting actions at law against the complainant, for alleged violations of an ordinance, there must be a suggestion of damages, in order to authorize a decree therefor.³

A statutory bond, the form of which is prescribed, will be construed to have the effect given by the statute, which enters into, and forms part of, the instrument.⁴

An injunction bond is designed to indemnify against immediate and actual loss, but not remote injuries, such as a damage to credit, resulting from the injunction. The condition of such a bond includes the right of recovery of costs, if such are in effect awarded against the complainant on a dissolution of the injunction.⁵

It is immaterial what was the motive, or whether or not there was probable cause, for suing out an injunction; nor is it any defense to an action on the bond, that the writ was unauthorized, because broader in its commands than was war-

¹ *Shaffer v. Sutton*, 49 Ill. 506;

Smith v. Powell, 50 Ill. 24; *Roberts v. Fahs*, 36 Ill. 268; Rev. Stat. (1893) 810; Rev. Stat. (1895) 859.

² *Fahs v. Roberts*, 54 Ill. 192.

³ *Forth v. Xenia*, 54 Ill. 210.

⁴ *Hibbard v. McKindley*, 28 Ill. 240.

⁵ *Hibbard v. McKindley*, 28 Ill. 240.

ranted by the order, it being the duty of the party suing out the writ to see that it is correct.¹

It is sufficient if the writ is shown to have been the same in substance and effect as alleged in the declaration.²

The dissolution of an existing injunction, for want of a proper bond, followed by an immediate order for a new injunction upon the filing of a new bond, would not—such new bond being filed—be such a dissolution as is contemplated by the statute in relation to damages.³

Where the original injunction bond in a cause was insufficient and a motion was made to dissolve the injunction on that ground, and thereupon the complainant moved for leave to file an amended bond, and such a bond was filed—it was held, that from the order of the court refusing the motion to dissolve the injunction, the amended bond would be presumed to be properly on file, even in the absence of an order expressly granting leave for it to be filed; and it could not be alleged, in an action on such bond, that it was filed without leave of the court.⁴

In a proceeding to enjoin the collection of a promissory note, the statute (of Illinois) does not prescribe the conditions to be inserted in the injunction bond; and in such cases the judge or master may require the complainant to give security for the payment of the note if he fails to maintain his suit. And where a bond is so conditioned for the payment of the debt, the liability of the surety therefor becomes fixed when the injunction is dissolved, and a recovery may be had against him in an action on the bond.⁵

On the occasion of the issuing of an injunction to restrain the collection of a school-tax, the bond was conditioned for the payment of “*all moneys and costs due or to become due*, and such damages as shall be awarded,” etc. In an action brought on this bond, the court, after remarking that this was not a bond given in any such case as is specified in the statute, held that the obligors were liable for the costs and expenses, including counsel fees, incurred by the defendants in the injunc-

¹ *Sturges v. Hart*, 45 Ill. 103.

⁴ *Farni v. Tesson*, 51 Ill. 393.

² *Sturges v. Hart*, 45 Ill. 103.

⁵ *Billings v. Sprague*, 49 Ill. 509;

³ *Beauchamp v. Kankakee*, 45 Ill. 274. see *McAllister v. Clark*, 86 Ill. 236.

tion, in litigating that matter, but not for the amount of the tax in controversy.¹

In the case of *Sturges v. Hart*, 45 Ill. 103, above mentioned, it is said that if the averments of damages, in the declaration, are not sufficiently specific, the objection must be taken by demurrer. Also, that upon proof of a loss of a sale of lands, by reason of an injunction, the extent of the damages may be shown by evidence of the deterioration in the market price or value of the lands; but the loss of sales must be shown by proving applications made by persons, in good faith, to purchase, and that the failure to sell was fairly attributable to the injunction. Slight, indefinite evidence on that subject is not sufficient.

In cases of the assessment of damages, under the act of 1861, requiring a suggestion in writing, the court is required to hear evidence in respect thereof; and such evidence must be preserved in the record, in order to support a decree awarding damages.² And there must be a suggestion in writing, in such case; and it is of no avail to file the suggestion after the assessment is made. The suggestion is designed to take the place of a declaration, and should be so framed as to inform the opposite party of the nature and amount of the damages claimed.³

Where a temporary restraining order is granted, until a formal application for an injunction can be made, and on the making of such application the injunction is denied, there can be no assessment of damages, the restraining order not requiring the action of a court to dissolve it.⁴

Solicitors' fees, and other expenses of the litigation, may be allowed as damages, on the dissolution of an injunction.⁵

But when counsel fees and expenses are incurred in defeating the action, and the dissolution of the injunction is only

¹ *Ryan v. Anderson*, 25 Ill. 330; see *Mason v. City*, 77 Ill. 533.

² *Forth v. Xenia*, 54 Ill. 210; *Spring v. Collector*, 78 Ill. 101; *Steele v. Boone*, 75 Ill. 457; *Delehanty v. Warner*, 75 Ill. 185; *Howard v. Austin*, 12 Bradw. 655.

³ *Winkler v. Winkler*, 40 Ill. 179;

Forth v. Xenia, 54 Ill. 210; *Wing v. Dodge*, 80 Ill. 564.

⁴ *Palmer v. Supervisors*, 46 Ill. 447; *Wilson v. Haecker*, 85 Ill. 349; *Blair v. Reading*, 99 Ill. 600; *Stinnett v. Wilson*, 19 Bradw. 38.

⁵ *Misner v. Bullard*, 43 Ill. 470; *Ryan v. Anderson*, 25 Ill. 330; *Jos-*

incidental to the result, such fees and expenses are not allowable.¹

No. 253. On a license bond—Action for use of wife of person to whom intoxicating liquors were sold.

(*Title of court, etc., as in No. 234, ante.*) The people of the State of Illinois, plaintiff, which sues in this behalf for the use of A. B., complains of C. D., E. F. and G. H., defendants, of a plea that they render to the plaintiff, for the use aforesaid, the sum of three thousand dollars, which they owe to and unjustly detain from the plaintiff: For that whereas the said C. D., on, etc., in, etc., applied for and obtained from the *mayor and common council of the city of —*, in the county aforesaid, a license to keep a grocery, and sell or give away intoxicating liquors, at *number —*, — *street*, in the said *city*, from the day aforesaid until the — day of, etc.; and on that occasion the defendants, on the day first aforesaid, in the county aforesaid, by their writing obligatory, bearing date of that day, and now to the court here shown, did jointly and severally acknowledge themselves to be held and firmly bound unto the plaintiff in the sum of three thousand dollars above demanded, to be paid to the plaintiff, upon the condition, nevertheless, that if the defendants should pay all damages to any person or persons which might be inflicted upon them, either in person or property, or means of support, by reason of the said C. D.'s selling or giving away intoxicating liquors, then the said writing obligatory was to be void, and otherwise to remain in full force. And the plaintiff in fact says, that the said C. D., after the making of the said writing obligatory, to wit, on the day first aforesaid, and on divers other days between that day and the said — day of, etc., (or "the commencement of this suit," *if the license has not expired*,) at the above mentioned place in the said *city*, did sell and give away, to one L. M., intoxicating liquors to be drank in, upon and about the building and premises where the same were so sold and given away as aforesaid, and in divers adjoining rooms, buildings and premises, and other places of public resort connected with the said building: And by reason of such selling and giving away of intoxicating liquors to the said L. M. by the said C. D. as aforesaid, he, the said L. M., during that time became an habitual drunkard, and wasted and squandered his moneys and property, and became greatly impoverished, reduced, degraded and ruined, as well in his mind and body as in his estate, and neglected and ceased to pursue his business and calling of a —, which he had theretofore used, or in any manner to earn or provide a livelihood for the said A. B., who was during all that time, and still is, the wife of the said L. M., to wit, in the county aforesaid; and thereby the said A. B., so being the wife of the said L. M. as aforesaid, has there lost and been deprived of her means of support: And also by reason of such selling and giving away of intoxicating liquors to the

lyn v. Dickerson, 71 Ill. 25; *Cummings v. Burleson*, 78 Ill. 281; *Spring v. Collector*, 78 Ill. 101.

¹*Sutherland on Dam.* 65, 68; *Gerard v. Gateau*, 15 Ill. App. 520; *Moriarity v. Galt*, 23 Ill. App. 213.

said L. M. by the said C. D. as aforesaid, he, the said L. M., on the day first aforesaid, and on the other days above mentioned, there became intoxicated, and being so intoxicated, and in consequence thereof, there assaulted, beat wounded and ill-treated the said A. B., and other wrongs to her then and there did: By means of which said premises the said A. B. has sustained damages to the amount of — dollars; yet the defendants have not paid the same or any part thereof, to her the said A. B. Whereby an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the said sum of three thousand dollars above demanded: Yet the defendants have not paid to the plaintiff that sum of money, or any part thereof, but refuse so to do; to the damage of the plaintiff, for the use aforesaid, of — dollars, and therefore the plaintiff, for the use aforesaid, brings suit, etc.

See the “act to provide against the evils resulting from the sale of intoxicating liquors in the State of Illinois.” An action may be brought on the bond “for the use of any person or persons, or their legal representatives, who may be injured by the selling of intoxicating liquors by the person” obtaining the license.¹ See also observations under precedent No. 351, *post*.

No. 254. On the statute,² against seller of intoxicating liquors, by one who has taken charge of person intoxicated.

(*Title of court, etc., as in No. 234, ante.*) A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea that he render to the plaintiff the sum of — dollars, which he owes to and unjustly detained from him. For that whereas the defendant, on, etc., in, etc., by the sale of intoxicating liquors did cause the intoxication of one G. H.; and thereupon the plaintiff there took charge of and provided for the said G. H., he being so intoxicated as aforesaid, and kept him, the said G. H., in consequence of such intoxication, for the space of — days, from and including the day aforesaid. By means whereof, and by force of the statute in such case made and provided, an action has accrued to the plaintiff to demand of the defendant a reasonable compensation for so taking charge of and providing for the said G. H. as aforesaid, which said reasonable compensation amounts to the sum of — dollars, parcel of the said sum of

¹ 1 Starr & Curtis, 969; see *Cobb v. People*, 84 Ill. 511; *People v. Crotty*, 93 Ill. 180; *Wright v. People*, 101 Ill. 126; *Moore v. People*, 109 Ill. 499; *Holmes v. Nooe*, 15 Bradw. 164; *Johnson v. Drummond*, 16 Bradw. 641; *O'Halloran v. Kingston*, 16 Brad. 659.

² Rev. Stat. (1893), 613; Rev. Stat. (1895), 661; 1 Starr & Curtis 971; *Confrey v. Stark*, 73 Ill. 187; *Ferguson v. People*, 73 Ill. 559; *Carroll v. People*, 13 Bradw. 206; *Brannan v. Adams*, 76 Ill. 331.

money above demanded, and also the sum of two dollars for each day the said G. H. was so kept by the plaintiff as aforesaid, amounting to the further sum of — dollars, residue of the said sum of money above demanded. Yet the defendant, though requested, has not paid to the plaintiff the said sum of — dollars above demanded, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The 8th section of the statute above referred to provides that "every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and two dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having jurisdiction."¹

No. 255. On the statute,² for cutting trees, etc.

(*Title of court, etc., as in No. 234, ante.*) A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of debt: For that whereas the defendant, on the — day of —, in the year 18—, in the county aforesaid, *ten* black walnut trees, *ten* black walnut saplings, *ten* black oak trees, *ten* black oak saplings, *ten* elm trees, *ten* elm saplings, *ten* cottonwood trees and *ten* cottonwood saplings, then standing and growing upon certain land, there situate, then belonging to the plaintiff, did cut, fell, box, bore, destroy and carry away, without having first obtained permission so to do from the plaintiff, then the owner of the said land as aforesaid; contrary to the form of the statute in such case made and provided: Whereby, and by force of the said statute, an action has accrued to the plaintiff to demand of the defendant the sum of eight dollars for each of the said black walnut trees, black walnut saplings, black oak trees and black oak saplings, and the sum of three dollars for each of the said elm trees, elm saplings, cottonwood trees and cottonwood saplings, together amounting to the sum *four hundred and forty* dollars. Yet the defendant, though requested, has not paid to the plaintiff the last mentioned sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

In an action on a statute, to recover a penalty, the damages

¹ 1 Starr & Curtis, 971; Rev. Stat. (1895) 1524; Rev. Stat. (1893) 1426; (1893), 613; Rev. Stat. (1895), 661. see *Cushman v. Oliver*, 81 Ill. 444.

² 2 Starr & Curtis 2388; Rev. Stat.

to be inserted in the declaration are merely nominal. The statute of Illinois, giving this action to the owner of the land, also gives an action of debt *qui tam* to any person who will first sue for the penalty—one half thereof to go to the person so suing, and the other half to the owner. If deemed expedient, the land may be described in the declaration, but this does not seem to be necessary.

The term *owner*, in the statute, is held to mean the person having an estate in fee simple in the land.¹ A less estate will not authorize a recovery under the statute.²

The plaintiff must aver that he was the owner of the land;³ consequently it is not sufficient to merely allege in the declaration that the defendant broke and entered the close of the plaintiff, and cut and carried away certain trees growing thereon.⁴ And the plaintiff is bound to show a title in the land, in fee simple.⁵ Actual possession of the land by the plaintiff, claiming the fee, would be presumptive evidence of title in him to that extent;⁶ but in the absence of evidence of this character, he must produce documentary proof of his title. An admission made by the defendant, before the trial, and not for the purposes thereof, that the trees were cut on the plaintiff's land, is not sufficient evidence on this subject.⁷

In an action on this statute, all the owners of the land must join. The omission of one who should have joined as plaintiff is fatal, and does not merely go in mitigation of the recovery, as the penalty is not divisible.⁸

The declaration should allege that the defendant felled the trees without having first obtained permission so to do from the owner of the land.⁹

¹ *Wright v. Bennett*, 3 Scam. 258; *Jarrett v. Vaughn*, 2 Gilm. 138; *Mason v. Park*, 3 Scam. 532; *Whiteside v. Divers*, 4 Scam. 336; *Edwards v. Hill*, 11 Ill. 22; *Behymer v. Odell*, 31 Ill. App. 350.

² *Jarrett v. Vaughn*, 2 Gilm. 132.

³ *Wright v. Bennett*, 3 Scam. 258; *Mason v. Park*, 3 Scam. 532; *Whiteside v. Divers*, 4 Scam. 336; *Edwards v. Hill*, 11 Ill. 22.

⁴ *Wright v. Bennett*, 3 Scam. 258.

⁵ *Wright v. Bennett*, 3 Scam. 258. *Mason v. Park*, 3 Scam. 532; *Whiteside v. Divers*, 4 Scam. 336; *Edwards v. Hill*, 11 Ill. 22.

⁶ *Mason v. Park*, 3 Scam. 532; *Clay v. Boyer*, 5 Gilm. 506; but see *Whiteside v. Divers*, 4 Scam. 336.

⁷ *Mason v. Park*, 3 Scam. 532.

⁸ *Edwards v. Hill*, 11 Ill. 22.

⁹ *Whitcraft v. Vandever*, 12 Ill. 235.

In order to recover, it is necessary to show that the statute has been willfully violated, by proof that the defendant in person cut the trees, or by his command or authority induced another person to do so. It is not sufficient to show that the trees were cut by persons employed by the defendant to cut trees on his own land, and were by them appropriated to his use.¹

Where the defendant has cut trees, knowing them not to be on land whereon he had any right so to do, the act is presumed to have been willful; and it is not necessary that the defendant should have known that the land belonged to the plaintiff.²

Although the defendant, to be liable under this statute, must have committed the act knowingly and willfully,³ it is not necessary to allege in the declaration that the act was "knowingly and willfully" committed, the statute not containing those words. In declaring upon a statute, it is a correct rule to describe the cause of action, whatever it may be, in the words of the statute, which words are to be construed to mean the same thing in a declaration as in the statute.⁴

The allegation of the precise time of the commission of the act is not essential; and where a declaration charged the cutting of trees on a certain day "and on divers other days between that day," etc., it was held sufficient, on demurrer, though it was urged that the day first mentioned was not within the period fixed by the statute of limitations.⁵ Instead of claiming a gross sum for the cutting of the whole number of trees, the declaration ought, in strictness, to show that the defendant has become liable to pay the amount fixed by the statute for each tree and sapling of the different kinds, naming them.⁶ A remedy on a penal statute must be strictly pursued, and a plaintiff can not recover unless he brings himself clearly within its provisions.⁷

¹ *Cushing v. Dill*, 2 Scam. 460.

² *Watkins v. Gale*, 13 Ill. 152.

³ *Whitecraft v. Vandever*, 12 Ill. 235; *Cushing v. Dill*, 2 Scam. 460.

⁴ *Gebhart v. Adams*, 23 Ill. 397.

⁵ *Gebhart v. Adams*, 23 Ill. 397.

⁶ *Whitecraft v. Vandever*, 12 Ill.

235; see *Behymer v. Odell*, 31 Ill. App. 350.

⁷ *Chicago v. Rumpff*, 45 Ill. 90; *Bullock v. Goemle*, 45 Ill. 218; *Figueria v. Pyatt*, 88 Ill. 402; *People v. Fesler*, 145 Ill. 150.

No. 256. *On the statute¹ against a drover, for driving off horses and cattle, etc.*

(*Title of court, etc., as in No. 234, ante.*) A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea that he render to the plaintiff the sum of *two thousand eight hundred* dollars, which he owes to and unjustly detains from him: For that whereas on, etc., in, etc., the plaintiff was a citizen of this state, and was the owner of *five* horses, each of the value of *one hundred* dollars, and *five* head of neat cattle, each of the value of *forty* dollars, and the defendant, then being a drover and person engaged in driving horses and cattle through a certain part of this state, to wit, through the county aforesaid, did then and there drive off, and knowingly and willingly suffer and permit to be driven off, the said horses and neat cattle of the plaintiff, from the premises of the plaintiff (or “from the range in which his stock then usually ran,”) to a distance exceeding five miles from the said premises (or “range”), contrary to the form of the statute in such case made and provided: Whereby, and by force of the said statute, an action has accrued to the plaintiff to demand of the defendant the sum of *two hundred* dollars for each of the said horses so driven away as aforesaid, and the sum of *eighty* dollars for each head of the said neat cattle so driven away as aforesaid, together amounting to the sum of *fourteen hundred* dollars, parcel of the said sum of *two thousand eight hundred* dollars above demanded.

(*Second count.*) And whereas also on the day aforesaid, in the county aforesaid, the plaintiff was a citizen of this state, and was the owner of *five* other horses, each of the value of *one hundred* dollars, and *five* other head of neat cattle, each of the value of *forty* dollars; and the defendant, then being a drover and person engaged in herding and driving certain horses and cattle in a certain part of this state, to wit, in the county aforesaid, did then and there permit the last mentioned horses and neat cattle of the plaintiff to remain with the defendant's drove for a longer period than two days and nights at one time; contrary to the form of the statute in such case made and provided: Whereby, and by force of the said statute, an action has accrued to the plaintiff to demand of the defendant the sum of *two hundred* dollars for each of the last mentioned horses so permitted to remain with the defendant's drove as aforesaid, and the sum of *eighty* dollars for each head of the last mentioned neat cattle so permitted to remain with the defendant's drove as aforesaid, together amounting to the sum of *fourteen hundred* dollars, residue of the said sum of *two thousand eight hundred* dollars above demanded.

Yet the defendant, though requested, has not paid to the plaintiff the last mentioned sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The second section of the Illinois statute concerning “Drovers,” provides that “in any action commenced under the

¹ 1 Starr & Curtis, 977; Rev. Stat. (1893) 615; Rev. Stat. (1895) 663.

preceding section, a *capias* may issue against the defendant or defendants, upon the plaintiff stating on oath that he believes some one or more of his cattle or other stock has been driven off by a drover, and that he believes the same to be of a certain value, to be indorsed on the writ; and the proceedings thereon shall be the same as in other actions commenced by *capias*: Provided, however, that no exception shall be taken to the form of the oath aforesaid." The third section provides that upon judgment rendered against the defendant, a *fieri facias* against his goods and chattels may immediately issue, without affidavit, unless an appeal shall at once be perfected.¹

Proof that the defendant was driving cattle through a part of this state, when some cattle of a citizen got into the drove; that the defendant knew they were in his drove, and he himself aided in branding them with the initial letter of his name, and castrated a bull which was among the number; and that he drove them twenty-five miles from their usual range, through a thickly settled country—there being a habitation on every mile of the route—is sufficient to support an action for the penalty, under the statute.²

Exceptions and provisos in statutes.—In an action founded on a penal statute, the subject of any exception, in the *enacting* or *prohibitory* clause of the act, must, in the declaration, be excluded by averment: But of any *proviso* or qualification, in a *separate substantive* clause, the declaration need not take notice.³ In the first case, the exception is an essential part of the *description of the offense* or thing prohibited; in the latter, the proviso, etc., is only distinct matter of *defense*. Thus, if a statute enacts that if any person, *not having a certain qualification* (as a freehold estate), shall kill certain game, he shall incur a certain penalty; the declaration, in an action on the statute, must aver that the defendant had *not* such a freehold. But if the act contains a separate *proviso*, that if he shall have obtained a *license* for the killing from a magistrate, he shall

¹ Starr & Curtis 978; Rev. Stat. (1893), 615; Rev. Stat. (1895), 663.

² Arnold v. Ludlam, 38 Ill. 190.

³ Rex v. Jarvis, 1 Burr. 153; King

v. Stone, 1 East 646; Spiers v. Barker, 1 T. R. 141; King v. Pratten, 6 T. R. 559.

not be liable to a conviction, it need not be stated that he had no such *license*.¹

No. 257. On the statute, against a sheriff, for not admitting attorney to see prisoner.

(*Title of court, etc., as in No. 234, ante.*) A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of debt: For that whereas the defendant, on, etc., was sheriff of the county aforesaid, and as such sheriff there had the custody of the plaintiff, who was then imprisoned and restrained of his liberty, in the common jail of the county aforesaid, on a certain charge of — theretofore and then alleged against him; and the plaintiff then and there desiring to see and consult one L. M., then a practicing attorney at law of this state, then and there requested the defendant to admit the said L. M. to see and consult the plaintiff, alone and in private, at the jail aforesaid; and although the said L. M. was then and there ready and willing, and offered, to see and consult the plaintiff as aforesaid, and although there was then and there no imminent danger of the escape of the plaintiff, yet the defendant did not nor would then, or at any other time, admit the said L. M. so to see and consult the plaintiff, alone and in private, at the said jail, as aforesaid, but refused so to do; contrary to the form of the statute in such case made and provided: Whereby, and by force of the said statute, an action has accrued to the plaintiff to demand of the defendant the sum of one hundred dollars. Yet the defendant, though requested, has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The statute of Illinois provides that “all public officers, sheriffs, coroners, jailers, constables or other officers or persons having the custody of any person committed, imprisoned or restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law of this state, whom such person so restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody; and when any such prisoner is about to be removed beyond the limits of this state, by any person or public officer, under any pretense whatever, he or she shall at all times be entitled to reasonable delay for the purpose of obtaining counsel, and of availing himself or herself of the laws of this state for the security of personal liberty.” Any violation of this act subjects the person offending

¹ Gould's Pl. 166.

to a forfeiture of one hundred dollars, to be recovered by action of debt, in any court of competent jurisdiction.¹

No. 258. On the statute,² by landlord against tenant, for double rent, for not quitting in pursuance of notice, etc.

(Commence as in last precedent.) For that whereas the defendant, at and before the time of the making of the demand and giving of the notice herein-after mentioned, and from thence until and upon the — day of, etc. (*the day when the tenancy determined*), held and enjoyed a certain parcel of land, with the appurtenances, situate, etc., as tenant thereof to the plaintiff (*here state the tenancy, which may be as follows—*) from year to year, for so long a time as the plaintiff and the defendant should respectively please, the reversion of the said parcel of land, with the appurtenances, during the said tenancy, belonging to the plaintiff, to wit, in the county aforesaid; and thereupon, while the defendant so held and enjoyed the said tenements, and while the said reversion so belonged to the plaintiff, as aforesaid, to wit, on, etc. (*the date of the notice*), he, the plaintiff, there demanded and required of the defendant, and gave him a notice in writing, to deliver the possession of the said tenements to the plaintiff on the said — day of, etc., on which day the term of the defendant in the said tenements expired: Nevertheless the defendant, not regarding the statute in such case made and provided, did not nor would at that time deliver the possession of the said tenements to the plaintiff, but refused so to do, and there willfully held over the said tenements, after the said demand and notice so made and given, and after the expiration of the said term as aforesaid, for the space of — — then next following, during all which time the defendant there kept the plaintiff out of the possession of the said tenements (he, the plaintiff, during all that time, being there entitled to the possession thereof), contrary to the form of the said statute. And the plaintiff avers that the said tenements, during the time last mentioned, were of the yearly value of — dollars. By means of which premises, and by force of the said statute, an action has accrued to the plaintiff to demand of the defendant the sum of — dollars, being at the rate of double the yearly value of the said tenements for the time the plaintiff was so kept out of the possession thereof as aforesaid.

(*Add two counts for use and occupation—see No. 241, ante—and the account stated, and conclude as follows:*)

Yet the defendant, though requested, has not paid to the plaintiff the several sums of money above demanded, together amounting to the sum of — dollars, or any part thereof, but refuses so to do: to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.³

Where the *tenant* gives notice to quit, and does not deliver possession accordingly, he forfeits “double the *rent* or sum

¹Rev. Stat. (1895), 553; Starr & Curtis, 818; Rev. Stat. (1893) 510.

²Starr & Curtis 1491; Rev. Stat. (1893) 919; Rev. Stat. (1895) 975.

³See Chit. Pl. 493.

which would otherwise have been due, to be collected in the same manner as the rent otherwise due should have been collected.”¹

No. 259. Declaration to recover delinquent taxes on forfeited property.

In the — Circuit Court.

— Term, A. D. 18—.

STATE OF ILLINOIS, }
County of — } ss.

The people of the State of Illinois, plaintiff, by G. H., attorney general, (or E. F., state's attorney, etc.,) complains of C. D., defendant, of a plea that he render to the plaintiff the sum of — dollars, which he owes to and unjustly detains from the plaintiff; for that the defendant, heretofore, to wit, on, etc., was and still is indebted to the plaintiff in the sum of — dollars, for and on account of divers amounts of taxes, interest, penalties and costs due and unpaid against divers tracts, pieces, parcels and lots of land of the defendant, situated in said county, and before said day forfeited to the State of Illinois, for the non-payment of the said taxes, interest, penalties and costs, which said real estate, together with the amount for which the same was forfeited, as aforesaid, is as follows, to wit: (*Here insert description.*)

And the plaintiff avers that the defendant on, to wit, the first day of May, A. D. 18—, was and still is the owner and possessed of the said real estate against which the said delinquent taxes are charged.

Wherefore, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to have and demand of and from the defendant the said several amounts of money, the same being in the aggregate, the said sum of — dollars, first above mentioned; yet the defendant, though requested, hath not paid the several sums of money, nor any or either of them, nor any part thereof, but fails and refuses so to do; to the damage of the plaintiff of — dollars, wherefore the plaintiff brings this suit, etc.

E. F., Att'y for Pl'ff.

Section 230 of the revenue law provides that the county board may at any time institute suit, in an action of debt, in the name of the people, in any court of competent jurisdiction, for the amount of taxes due on forfeited property,² or for the recovery of any personal property tax due from any person, firm or corporation.³

¹ Rev. Stat. (1893) 920; Starr & Curtis 1492; 1 Chit. Pl. 112; Rev. Stat. (1895) 976.

² Rev. Stat. (1893), 1217; Rev. Stat. (1895), 1302; 2 Starr & Curtis, 2105;

see *People v. Biggins*, 96 Ill. 383; *People v. Davis*, 112 Ill. 272; *Bowman v. People*, 114 Ill. 474.

³ *Ibid.*

A recovery may be had of the entire personal tax, and the county, on collection of the same, will be required to pay over to the several municipal corporations their respective shares.¹

The liability for taxes is statutory and arises upon the failure of the citizen to pay taxes on property owned by him on the first day of May in any year. Such facts must therefore be averred in the declaration, not only that show the statutory liability, but the right of the plaintiff to recover.²

A declaration against a corporation is insufficient where it fails to state that it had its principal place of business at the place where such taxes were assessed.³

Against railroad companies.—The action lies against a railroad company for extortion, or for making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights.⁴ And against railroad companies, their officers, agents and employes, and every owner, lessee, manager or employe of any warehouse, who shall willfully neglect to make and furnish any report to the railroad and warehouse commissioners, as required by the statute; or who shall willfully and unlawfully hinder, delay or obstruct said commissioners in the discharge of the duties imposed upon them. All such prosecutions shall be in the name of the people of the State of Illinois. The act, however, is not to be construed so as to prevent any person from prosecuting any *qui tam* action, as authorized by law, and of receiving such part of the amount recovered in such action as is or may be provided under any law of this state.⁵

Section 36 of the act on railroads and warehouses provides that if any railroad corporation, or any of its agents, servants or employes, shall violate any of the provisions of the statute in relation to fencing and operating railroads, such corporation, agent, servant or employe shall severally be liable to a fine of not less than \$10, nor more than \$200, to be recovered

¹ *Dalby v. People*, 124 Ill. 66.

² *Gas Co. v. People*, 138 Ill. 336.

³ *Gas Works v. People*, 156 Ill. 387.

⁴ 2 Starr & Curtis 1963; Rev. Stat. (1893) 1127; Rev. Stat. (1895) 1211.

⁵ Rev. Stat. (1893); Rev. Stat. (1895), 1225; 2 Starr & Curtis.

in an action of debt, in the name of the people of the State of Illinois, for the use of any person aggrieved, before any court of competent jurisdiction.¹

Against county clerk.—Sections 13 and 14 of the statute on marriages provide that “if any county clerk shall issue a license for the marriage of a man under the age of twenty-one years, or of a woman under the age of eighteen years, without the consent of his or her father, (or if he is dead or incapable, or not residing with his family, of his or her mother or guardian, if he or she have one,) first had thereto, he shall forfeit and pay the sum of \$300 for each offense, to be recovered by such father, mother or guardian, in an action of debt, in any court of competent jurisdiction.”²

“If any county clerk shall refuse or neglect to register and file any marriage certificate according to law, for more than thirty days after the same is returned to him for that purpose (his fees therefor being paid), he shall forfeit and pay \$100, to be recovered by the party injured, in an action of debt, in any court of competent jurisdiction.”

Sections 15 and 16 of said statute provide that if any minister, judge or justice of the peace, or any other officer or person or persons, shall celebrate a marriage without a license having been first obtained therefor as provided by law, and if any minister, judge or justice of the peace, having celebrated a marriage, or any clerk or secretary of any society, church or denomination among whom a marriage is celebrated, and whose duty it shall be to make and return a certificate of such marriage, shall fail to make and return to the county clerk, such certificate in the time and manner provided by law, he shall forfeit and pay \$100, to be recovered in the name of the people of the State of Illinois, in action of debt, in any court of competent jurisdiction.³

DEFENSES TO THE ACTION OF DEBT.

The rules which have been laid down respecting defenses in the action of assumpsit are generally applicable in debt. The

¹ Starr & Curtis 1948; Rev. Stat. (1893), 1121; Rev. Stat. (1895), 1205.

² Rev. Stat. (1895), 1023; Rev. Stat. (1893), 960; see *Campbell v. Beck*, 50

Ill. 171; *Lyndon v. Lyndon*, 69 Ill. 43; *Gilbert v. Bone*, 79 Ill. 341; *Hilboldt v. Caraker*, 41 Ill. App. 596.

³ Rev. Stat. (1895), 1023.

pleas in abatement, and many of those in bar, in assumpsit, with a slight alteration, can be used in this action; and it is not deemed necessary or expedient to again insert them in this place; but a few forms of pleas in bar, adapted to this form of action, will be here presented.

Pleas in abatement.—For pleas in abatement and proceedings thereon, and general observations on the subject, see pleas in abatement, page 35, *ante*.

Pleas in bar.—The general rules and observations concerning pleas in bar in assumpsit are for the most part applicable to pleas of the same nature in debt.

No. 260. Plea of nil debet.

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } *Debt.*

A. B. } And the defendant by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against him; and of this the defendant puts himself upon the country, etc.

The plea of *nil debet* is the general issue in those actions where it is properly pleadable. It is a proper plea in debt on simple contracts or legal liabilities, or for an escape, or on a penal statute, or when a deed is mere inducement to the action; but not when the action is founded on a specialty, (as on a bail bond, etc.,) or on a record.¹ It is a good plea to an action on a justice's judgment of another state.²

As a judgment of a court of record of another state is conclusive as to the amount of the debt, the plea of *nil debet* is not proper in an action on such judgment,³ but it seems that this plea is admissible in debt on a judgment of a court of another state, when the court had no jurisdiction.⁴ To an action of debt on

¹ Chit. Pl. 422, 423; *Jones v. Pope*, 1 Saund. 38; *Bullis v. Giddens*, 8 Johns. 83; *Chippis v. Yancey*, Breese 19; *Davis v. Burton*, 3 Scam. 42; *King v. Ramsay*, 13 Ill. 619; *Shunick v. Thompson*, 25 Ill. App. 619.

² *Bank v. Harding*, 5 Ohio 546;

Warren v. Flagg, 2 Pick. 248; *Cole v. Driskell*, 1 Blackf. 16.

³ *Lawrence v. Jarvis*, 32 Ill. 305; *Ins. Co. v. Barker*, 55 Ill. 241.

⁴ *Hall v. Williams*, 6 Pick. 232; *McRae v. Mattoon*, 13 Pick. 53; *Bisell v. Briggs*, 9 Mass. 462; *Wright*

a statute for a penalty, *nil debet* is the best general issue, but not guilty is admissible.¹ In debt for rent by the lessor against the assignee of the lessee, a plea of *nil debet* puts in issue the whole declaration.²

Where a deed is only inducement to the action and matter of fact the foundation of it, this plea may properly be pleaded, as in debt for rent due on an indenture of lease, though the plaintiff has declared setting out the indenture; yet as the fact of the subsequent occupation gives the right to the sum demanded, and is the foundation of the action, and the lease is mere inducement, the defendant may plead *nil debet*, and for the same reason this plea is proper in debt for an escape, or on a *devastavit* against an executor, the judgment in these cases being merely inducement, and the escape or *devastavit* the foundation of the action. But when the deed is the foundation of the action, although extrinsic facts are mixed with it, the defendant must plead *non est factum*, and *nil debet* is not a sufficient plea, as in debt for a penalty on articles of agreement, or on a bond, setting out the condition and breach, or on a bail bond.³

Non assumpsit is not a proper plea in an action of debt.⁴

The plea of *nil debet*, in debt on a specialty, is not a nullity, but is bad on demurrer;⁵ and a judgment over such a plea unanswered is erroneous.⁶ This plea, like the general issue in *assumpsit*, puts the plaintiff on proof of the whole of the allegations, in the declaration.⁷ The language of the plea puts in issue the existence of the debt at the time of bringing the action; and consequently any matter may be given in evidence,

v. Boynton, 37 N. H. 9; *Judkins v. Ins. Co.*, 37 N. H. 470; see *Ins. Co. v. Barker*, 55 Ill. 241.

¹ *Stilson v. Tobey*, 2 Mass. 521; *Burnham v. Webster*, 5 Mass. 266; 1 Chit. Pl. 428.

² *Trustees v. Clough*, 8 N. H. 22.

³ 1 Chit. Pl. 423, 424; *Stephen's Pl.* 174, n.

⁴ *Harlow v. Boswell*, 15 Ill. 56; *Lancaster v. Lancaster*, 29 Ill. App. 510.

⁵ *Trimble v. State*, 4 Blackf. 435;

Love v. Kidwell, 4 Blackf. 553; *Eakle v. Oliver*, 5 Blackf. 3; *Smith v. Stewart*, 6 Blackf. 162; *Shook v. State*, 6 Ind. 113; 1 Chit. Pl. 424; *Shumick v. Thompson*, 25 Ill. App. 619.

⁶ *Tate v. Wymond*, 7 Blackf. 240; *Wheeler v. Curtis*, 11 Wend. 653.

⁷ *Jansen v. Ostrander*, 1 Cowen 670; *Brown v. Littlefield*, 7 Wend. 456; *Gavin v. Annan*, 2 Cal. 494; 1 Chit. Pl. 422-424.

under such plea, which shows that nothing was due at that time, as payment, or release, or other matter in discharge of the debt.¹

Where *nil debet* is pleaded to an action on a bond, etc., the plaintiff ought to demur, for if he does not he will have to prove every allegation in his declaration, and the defendant will be at liberty to avail himself of any ground of defense which in general may be taken advantage of under this plea.²

No. 261. Plea of non est factum.

(*Title of court, etc., as in last precedent.*) And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and says that the supposed writing obligatory (or "deed," or "indenture," etc.) in the said declaration mentioned is not his deed; and of this he puts himself upon the country, etc.

(*To put the plaintiff upon proof of the execution of the instrument, add affidavit as in No. 137, ante, which see.*)

In debt on bond, or other specialty, when the deed is the foundation of the action, the plea of *non est factum* is proper, either when the plaintiff's *profert* can not be proved as stated, or the deed was not executed, or varies from the declaration.³

This plea may be pleaded in Illinois, notwithstanding it is not verified by affidavit,⁴ though by the statute a defendant can not deny on the trial the execution of any instrument in writing, whether sealed or not, upon which any action is brought, unless his plea is verified by affidavit.⁵ A plea so verified puts the plaintiff upon proof of the execution of the instrument sued on, but the affidavit is not evidence for the defendant.⁶

¹ *Linds v. Gardner*, 1 Cranch 313; *Gavin v. Annan*, 2 Cal. 494; 1 Chit. Pl. 422.

² *Kilgour v. Drain. Comm.*, 111 Ill. 342; *Mix v. People*, 86 Ill. 329; 1 Chit. Pl. 424; *Caldwell v. Richmond*, 64 Ill. 30.

³ 1 Chit. Pl. 424; *Gardner v. Gardner*, 10 Johns. 47.

⁴ *Russell v. Hamilton*, 2 Scam. 56; see *Melvin v. Hodges*, 71 Ill. 422; *Schroeder v. Harvey*, 75 Ill. 638.

⁵ Rev. Stat. (1893) 1075; 2 Starr &

Curtis, 1798; Rev. Stat. (1895) 1159; *Flax Co. v. Beebe*, 48 Ill. 138; see *Pritchett v. People*, 1 Gilm. 525; *People v. Yeazel*, 84 Ill. 538; *Herrick v. Swartwout*, 72 Ill. 340; *Kitner v. Whitlock*, 88 Ill. 513; *Delahay v. Clement*, 2 Scam. 575; *Gaddy v. McCleave*, 59 Ill. 182; *Martin v. Culver*, 87 Ill. 49; *Mix v. People*, 92 Ill. 549; *Wallace v. Wallace*, 8 Bradw. 69; *Raird v. Best*, 13 Bradw. 385.

⁶ *Walter v. Trustees*, 12 Ill. 64; *Hunter v. Harris*, 131 Ill. 482.

A defendant may give in evidence, under the plea of *non est factum*, that the deed was delivered to a third person as an escrow, (though it is more usual to plead the fact,)¹ or that it was void at common law *ab initio*.²

The plea of *non est factum* only denies the giving of the deed; and it is not necessary for the plaintiff, on the issue presented by that plea, to prove the averments of other matters or the breaches contained in his declaration, as the plea admits them.³ A notice of special matter of defense may be given with the plea of *non est factum*.⁴

If this plea is pleaded, although not verified by affidavit, it requires the instrument to be produced on the trial,⁵ or at least to be accounted for. See the observations under the plea of *non est factum*, in covenant, *ante* (No. 155).

No. 262. *Non est factum and nil debet, to debt on bond and simple contract.*

(*Title of court, etc., as in No. 260, ante.*) And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and as to the said first count of the said declaration, says that the supposed writing obligatory therein mentioned is not his deed: And of this he puts himself upon the country, etc.

And as to the said second, third, fourth and last counts of the said declaration. the defendant says that he does not owe the said sums of money therein mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff has above complained against him: And of this the defendant puts himself upon the country, etc.

No. 263. *Plea of non est factum, after craving oyer, etc.*

(*Title of court, etc., as in No. 260, ante.*) And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and craves oyer of the supposed writing obligatory in the said declaration mentioned, and it is read to him, etc. He also craves oyer of the condition of the said

¹ 4 Esp. 225; 6 Mod. 217; 1 Salk. 274; 1 Chit. Pl. 424; see *Governor v. Lagow*, 43 Ill. 134.

² *Phelps v. Decker*, 10 Mass. 267; *Anthony v. Wilson*, 14 Pick. 303; 1 Chit. Pl. 424.

³ *Legg v. Robinson*, 7 Wend. 194; *Gardner v. Gardner*, 10 Johns. 47; *Utter v. Vance*, 7 Blackf. 514; *Courcier v. Graham*, 1 Ohio 330; *Reynolds*

v. Executors, 5 Ohio 169; *Granger v. Granger*, 6 Ohio 35; 1 Chit. Pl. 428; see *Governor v. Lagow*, 43 Ill. 134.

⁴ *Beach v. Springer*, 4 Wend. 519; *Granger v. Granger*, 6 Ohio 35; *Reynolds v. Executors*, 5 Ohio 340.

⁵ *Fosdick v. Starbuck*, 4 Blackf. 417; see 1 Chit. Pl. 424.

supposed writing obligatory, and it is read to him in these words: "Whereas (*here set forth, verbatim, the recitals, if any and the condition*) Which being read and heard, the defendant says that the said supposed writing obligatory is not his deed; and of this he puts himself upon the country, etc.

If the action is upon an indenture, etc., say—

"Craves oyer of the supposed indenture (*or as the case may be*) in the said declaration mentioned, and it is read to him in these words: (*setting forth the instrument, verbatim.*) Which being read and heard, the defendant says," etc.

It is not usual to plead *non est factum*, setting out the condition, or the indenture, etc., on oyer, except where the defendant pleads double.¹ The practical use of demanding oyer, in pleading, is to enable the party demanding it to recite upon the record the instrument pleaded against him, and thus avail himself, *upon the face of the record*, of anything in the writing which may aid him in meeting the allegations of his adversary—a writing thus set out on oyer being considered as a part of the last pleading of the *opposite* party. Thus to debt on bond, the defendant having recited the condition, on oyer, is enabled to avail himself of it, by pleading or demurring, as his case may require. Oyer is of course unnecessary when the instrument is truly set out, *in hæc verba*, in the previous pleading.

On the subject of oyer, see 1 Chit. Pl. 369 to 375; Gould's Pl., chap. 8, secs. 32 to 64; Andrews' Steph. Pl., 144 to 159; Rev. Stat. (1895) 1157.

Special non est factum.—In actions founded on deeds, the defendant *may*, instead of pleading *non est factum* in common form, allege any special matter, which *admits the execution* of the writing in question, but which shows, nevertheless, that it is not *in law his deed*; and may conclude with *non est factum*: As that the writing was delivered to J. S. as an *escrow*, to be delivered over, on a certain condition, which has not been complied with, "and *so* is not his act:" Or, that the writing *has been altered* by the plaintiff, since its delivery, "and *so* is not his act:" Or, that the defendant was, at the time of making the writing, a *feme covert*; "and so it is not her act." In a plea of this kind, the latter part (the *non est factum*) is merely

¹ 3 Chit. Pl. 953, 954, notes.

an *inference* from the special matter which precedes it: The word “*so*” being used in an illative sense, and conveying the same meaning as the word “therefore.” The special matter then merely shows *how* and *why* the instrument is not the defendant’s act; and on the trial of the issue, the evidence on both sides is confined to the *special matter* alleged.¹

Duress, infancy, or other matter which renders the deed merely voidable, can not properly be pleaded in this form.²

The effect of a demurrer to a special *non est factum* is strictly analogous to a demurrer to evidence; the question of law being, on a demurrer to such plea, whether the facts therein specially set forth are sufficient in law to maintain the general issue (with which it concludes) in favor of the party pleading them.³

The better authority appears to be, that this plea should conclude to the country;⁴ though according to some opinions it may and should conclude with a verification. But a conclusion with a verification “would alter the essential character of the plea, and convert it into a mere *special plea amounting to the general issue*, which is, regularly, inadmissible.”⁵

No. 264. Plea that bond was delivered as an escrow.

(First plea, *non est factum*, as ante, No. 261; second plea, *onerari non*, etc., as in next form, to the asterisk, and then proceed :) that the said writing in the said declaration mentioned was made by the defendant, on, etc., aforesaid, to secure the repayment of a certain sum of money then lent by the plaintiff to one E. F., and was delivered by the defendant to one G. H., as an escrow, to be kept by him on this special condition, that is to say, that (here set forth the condition, according to the facts, in this manner—) if the said E. F. should, within the space of — months then next following, secure the repayment of the said sum of money to the plaintiff, by a mortgage on a certain parcel of land of the said E. F., situate, etc., then the said writing should be immediately discharged, annulled and held for nothing, and redelivered to the defendant; but that in default of the said E. F.’s so securing the repayment of the said sum of money as aforesaid, then the said writing of the defendant should stand and be against him in full force. And the defendant further says, that within the space of — months from the time of the making and delivering of the said writing as an escrow to

¹ Gould’s Pl. 312.

² *Id.* 300, 301, 314.

³ *Id.* 314.

⁴ Gould’s Pl. 314; 3 Chit. Pl. 962,

n.; 1 *Id.* 475; *Hinton v. Husband*, 3 Scam. 187.

⁵ Gould’s Pl. 315; see *Governor v.*

Lagow, 43 Ill. 134.

the said G. H. as aforesaid, to wit, on, etc., in, etc., the said E. F. did secure the repayment of the said sum of money to the plaintiff, by a mortgage upon the said parcel of land, which said mortgage the plaintiff then and there accepted and received as a security for the repayment of the said sum of money so by him lent to the said E. F. as aforesaid; whereby the said writing became and was wholly discharged and annulled. And so the defendant says, that the said writing is not his deed; and of this he puts himself upon the country, etc.

It seems that the plea must show to whom the bond was delivered;¹ and it is no escrow if delivered to the obligee.²

An escrow is a deed conditionally delivered to a stranger, and not to the obligee or grantee himself, to be held until a certain condition shall be performed, and then to be delivered to the obligee or grantee. Until the condition is performed, and the deed delivered over, it does not take effect.³ A relation back to the first delivery, so as to give the deed effect from that time, is, however, allowed in cases where necessary to render the deed valid—as where a *feme sole* makes a deed, and delivers it as an escrow, and then marries before the second delivery.⁴

As has been already observed, the delivery of a deed as an escrow may be given in evidence under the plea of *non est factum*, though it is more usual to plead it.⁵

No. 265. Onerari non.

(When pleaded as a second or subsequent plea, commence thus:) And for a further plea in this behalf, the defendant says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, (or “indenture,” etc., or “the said writing,”) because he says, (*) that (here state the subject-matter of the defense, and conclude as follows:) And this the defendant is ready to verify; wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said supposed writing obligatory (or “indenture,” etc.)

¹ 5 Bac. Abr. 160, Oblig. C.

² Hob. 246; Ventr. 9; 2 Stark. Ev. 271; *Foley v. Cowgill*, 5 Blackf. 18; *Moss v. Riddle*, 2 Pet. C. Rep. 277; see *Neely v. Lewis*, 5 Gilm. 31; *Stone v. Duvall*, 77 Ill. 475; *Land Co. v. Peck*, 112 Ill. 231; *Weber v. Christen*, 121 Ill. 94.

³ *Jackson v. Catlin*, 2 Johns, 248;

Catlin v. Jackson, 8 Johns. 520; *Furness v. Williams*, 11 Ill. 229; *Foy v. Blackstone*, 31 Ill. 538; *Price v. R. R. Co.*, 34 Ill. 13; *Leiter v. Pike*, 127 Ill. 326.

⁴ 2 Bl. Com. 307; 2 Bouv. Inst. n., 2024; 4 Kent Com. 446.

⁵ 1 Chit. Pl. 424; see *Governor v. Lagow*, 43 Ill. 134.

Where the validity of the deed is disputed, or where an heir pleads *riens per descent*, the defendant should say *onerari non debet*, (as above,) and *actionem non*; and the plea should describe the deed as a *writing*, or supposed writing obligatory, (or “indenture, etc.,) and should not admit that it is a deed.¹

No. 266. *Plea of tender, to debt on simple contract*—*Nil debet as to part, and tender as to residue.*

(*Title of court, etc., as in No. 260, ante.*) And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and as to the several sums of money in the said declaration mentioned, and thereby demanded, except as to the sum of — dollars, (*the sum tendered,*) parcel thereof, says that he does not owe the same, or any part thereof, to the plaintiff, in manner and form as the plaintiff has above complained against him, the defendant: And of this he puts himself upon the country, etc.

And as to the said sum of — dollars, parcel, etc., the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, to recover any damages by reason of the non-payment of that sum of money, because he says, that he was when the same became due, and from thence hitherto has been, and still is, ready to pay to the plaintiff the said sum of — dollars, parcel, etc., to wit, in the county aforesaid; and that after the same became due, and before the commencement of this suit, to wit, on, etc., the defendant was there ready and willing, and tendered and offered, to pay to the plaintiff the said sum of — dollars, parcel, etc., to receive which of the defendant, he, the plaintiff, then and there wholly refused; and the defendant now brings the said sum of money, so tendered, into the court here, ready to be paid to the plaintiff, if he will accept the same. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action to recover any damages by reason of the non-payment of the said sum of — dollars, parcel, etc.

If the money has already been paid into court, then instead of alleging the bringing in thereof, as in the above form, say —“and the defendant avers that he has paid the said sum of money, so tendered, into the said — court of, etc., ready to be paid,” etc. A tender must be pleaded. See the form No. 121, *ante*, and the observations thereunder.

No. 267. *Plea of nul tiel record.*

(*Title of court, etc., as in No. 260, ante.*) And the defendant, by G. H., his attorney, comes and defends the wrong and injury, when, etc., and

¹ 1 Chit. Pl. 471; 3 Chit. Pl. 955, *n.*

says that there is not any record of the supposed recovery in the said declaration mentioned, remaining in the said — court of, etc., in manner and form as the plaintiff has above in his said declaration alleged: And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.

It seems the words, "and this defendant is ready to verify," are not necessary.¹

It is the proper practice for the court to determine the issue on the plea, by an inspection of the transcript of the record; and if this fails to show jurisdiction of the person of the defendant, it can not be aided by other evidence.²

The plea of *nul tiel record* draws nothing in question but the existence of the record.³ The party can not, therefore, under such plea, set up, in contradiction of the record, that he was not served with process, or that he did not appear by attorney.⁴ But where the record shows an appearance by attorney, the defendant may plead and prove that the attorney had no authority to appear for him.⁵

It is held that the defense that a judgment of another state, on which an action is brought, was obtained by fraud, is not available at law, and that the proper course is to seek relief by bill in chancery, impeaching the judgment for that cause;⁶ but this doctrine is denied.⁷

A variance between the record declared on and the one produced in evidence, can be taken advantage of by a plea of *nul tiel record*.⁸

¹ 3 Chit. Pl. 995, n; Com. Dig. Pl. E. 33.

² *Kimball v. Merrick*, 20 Ark. 12; *Pitt v. Knight*, 1 Saund. 92, n. 3; *Riley v. Riley*, 1 Spencer (20 N. J.) 114.

³ *Anderson v. Anderson*, 8 Ohio 108.

⁴ *Bennett v. Morley*, 10 Ohio 100; *Westervelt v. Lewis*, 2 McLean 511; *Hall v. Williams*, 6 Pick. 232; *Shumway v. Stillman*, 6 Wend. 447; *Welch v. Sykes*, 3 Gilm. 197; *Rust v. Frothingham*, Breese 331.

⁵ *Welch v. Sykes*, 3 Gilm. 197;

Bimeler v. Dawson, 4 Scam. 536; *Hall v. Williams*, 6 Pick. 232; *Shumway v. Stillman*, 6 Wend. 447.

⁶ *Anderson v. Anderson*, 8 Ohio 108; Story's Eq. Pl. sec. 426; see *Ambler v. Whipple*, 139 Ill. 311.

⁷ *Bimeler v. Dawson*, 4 Scam. 536, and cases cited; *Welch v. Sykes*, 3 Gilm. 197; *Borden v. Fitch*, 15 Johns. 121; *Andrews v. Montgomery*, 19 Johns. 162; see *Ambler v. Whipple*, 139 Ill. 311.

⁸ 2 Paine C. C. R. 209; *Randolph v. Keiler*, 21 Missouri 557; *Smith v. Brush*, 8 Johns. 83; *Stra*, 1721; *Pitt*

The plea of *nul tiel record*, in *scire facias* on a mortgage, only puts in issue the execution and registry of such mortgage.¹ This plea is improper in an action of debt on an appeal² or a replevin bond.³

In general, the conclusion of a plea of *nul tiel record* to the country, is wrong; but such defect can only be taken advantage of by a special demurrer.⁴

It was held in England that the plea of *nul tiel record*, pleaded to an *Irish* judgment, must conclude to the country, for though since the union of England and Ireland such judgment was a record, yet it was only provable by an examined copy on oath, the verity of which was only triable by a jury.⁵

And in the case of *Baldwin v. Hale*, 17 Johns. (N. Y.) 272, it was held that a circuit court of the *United States*, in relation to a *state* court, was to be regarded as a court of another government, and its records, therefore, must be considered as foreign records, and their verity must be tried by a jury. But under the act of congress which provides for the manner of proving the records of the courts of the various *states*, by the attestation of the clerk and the seal of the court annexed, with the certificate of the judge,⁶ the proving of such records by examined copy is not necessary, and the issue of *nul tiel record* is tried by the court by an inspection of the record.

No. 268. *Replication to plea of nul tiel record.*

In the ——— Court.

—— term, 18—.

A. B.)
vs.) *Debt.*

C. D.) And the plaintiff, as to the plea of the defendant by him *first* above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because

v. Knight, 1 Saund. 92, n. 3; *Giles v. Shaw*, Breese 125; *Giles v. Shaw*, Breese 219.

¹ *Woodbury v. Manlove*, 14 Ill. 213.

² *Arnott v. Friel*, 50 Ill. 174; *Herrick v. Swartwout*, 72 Ill. 340; *Mix v. People*, 86 Ill. 329.

³ *Tedwick v. Wells*, 59 Ill. App. 657.

⁴ *Steele v. Hanna*, 8 Blackf. 326; Co. Lit. 117, b; see Chit. Pl. 475, 476.

⁵ *Collins v. Mathew*, 5 East 473; see 1 Chit. Pl. 475.

⁶ Rev. Stat. (1893) §6; Rev. Stat. (1895) 86; 1 Starr & Curtis 1094; see *Mills v. Duryea*, 7 Cranch 481; *Hampton v. McConnel*, 3 Wheat. 234; *Bimeler v. Dawson*, 4 Scam. 536.

he says, that there is such record of the said recovery remaining in the said — court of, etc., as he has above in his said declaration alleged: And this the plaintiff is ready to verify by the said record, etc., and he prays that the same may be seen and inspected by the court here, etc.

No. 269. Plea of duress—Menace to kill.

(*First plea*, non est factum, as ante, No. 261; *second plea*, onerari non, etc., as in No. 265, ante, to the asterisk, and then proceed—) that the plaintiff, just before the making of the said writing in the said declaration mentioned, to wit, on, etc., in, etc., threatened the life of the defendant, unless he, the defendant, would make, seal and deliver the writing aforesaid, and the defendant did thereupon then and there, by reason of such threats, and in fear thereof, make, seal and deliver the said writing. And this, etc. (*concluding with a verification*, as in No. 265, ante).

No. 270. Replication to plea of duress, No. 269.

(Similiter to non est factum, as ante, No. 10.) And the plaintiff, as to the plea of the defendant by him *secondly* above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says, that the defendant, of his own free will, made, sealed and delivered to the plaintiff the said writing obligatory, and not by reason of the supposed threats in the said *second* plea mentioned, or in fear thereof, in manner and form as the defendant has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

The plea may allege a battery and menace of further battery, or a battery and fear of mayhem, or duress of imprisonment, etc. See the precedents. 3 Chit. Pl. 964, 965.

Fear of unlawful imprisonment will constitute a case of duress *per minas* and avoid a contract.¹

The general rule is, that the imprisonment or duress must either be tortious, and without authority, or be an abuse of lawful authority to arrest, to constitute duress by imprisonment.²

See the Illinois cases noted below, on this subject.³

¹ Co. Lit. 253, 6; 2 Inst. 483; *Foshay v. Ferguson*, 5 Hill (N. Y.) 154.

² 2 Kent's Com. 565; *Watkins v. Baird*, 6 Mass. 511; *Taylor v. Cottrell*, 16 Ill. 93; see *Plummer v. People*, 16 Ill. 358; *Gingrich v. People*, 34 Ill. 448; *Huggins v. People*,

39 Ill. 242; *Haskin v. Haskin*, 41 Ill. 197; *Stover v. Mitchell*, 45 Ill. 213.

³ *Taylor v. Cottrell*, 16 Ill. 93; *Plummer v. People*, 16 Ill. 358; *Bane v. Detrick*, 52 Ill. 20; *Thurman v. Burt*, 53 Ill. 129; *Gingrich v. People*, 34 Ill. 448; *Huggins v. People*, 39 Ill. 242; *Haskin v. Haskin*, 41 Ill. 197;

No. 271. *Plea of set-off, to debt on a money bond with a penalty.*

(If pleaded as a first plea, commence—after the entitling— “ And the defendant, by G. H., his attorney, comes and defends, etc., when, etc., and says that the plaintiff ought not,” etc. If as a second or subsequent plea, commence thus :) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, (*) that at the time of the commencement of this suit there was due from the defendant to the plaintiff, upon the said writing obligatory, by the said condition thereof, for the principal and interest in the said condition mentioned, the sum of — dollars: And the defendant further says that the plaintiff was before and at the time of the commencement of this suit, and still is, indebted to him, the defendant, in a much larger sum of money than the said sum so due from the defendant to the plaintiff upon the said writing obligatory, that is to say, in the sum of — dollars; for (*here state the subject-matter of the set-off*) which said sum of money so due from the plaintiff to the defendant, as aforesaid, or so much thereof as shall be necessary in this behalf, the defendant is ready and willing, and offers, to set off and allow against the said sum of money so remaining due by the said condition of the said writing obligatory, according to the form of the statute, etc. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action, etc.

See form 105, *ante*, and the observations thereunder. In the above plea, and the next following, oyer should be craved, (as in No. 263,) if the declaration does not set forth the condition and breach. But if *non est factum*, craving oyer (No. 262) is pleaded, then it is not necessary to again demand oyer in a subsequent plea.

No. 272. *Plea of payment—To debt on bond (solvit ad diem).*

(As in last precedent to the asterisk, and then proceed—) that on the said — day of, etc., in the said condition of the said writing obligatory mentioned, he, the defendant, paid to the plaintiff the said sum of — dollars, in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, in the county aforesaid: And this, etc. (*concluding with a verification, as in last precedent.*)

Stover v. Mitchell, 45 Ill. 213; *Schomer v. Farwell*, 56 Ill. 542; *Swanston v. Ijams*, 63 Ill. 165; *Peacock v. People*, 83 Ill. 331; *R. R. Co. v. Thomas*, 85 Ill. 464; *Compton v. Bank*, 96 Ill. 301; *Willitts v. Willitts*, 104 Ill. 122; *Brower v. Callender*, 105 Ill. 88; *Overstreet v. Dunlop*, 56 Ill. App. 486; *Lamson v. Boyden*, 57 Ill. App. 232.

If payment after the day is pleaded, (*solvit post diem*,) then say that “after the said — day of, etc., in the said condition mentioned, and before the commencement of this suit, to wit, on etc., he, the defendant, paid,” etc.; and omit the words “according to the form and effect,” etc.

No. 273. Plea of failure of consideration—To debt on specialty.—[30 Ill. 329.]

(*First plea, non est factum, as ante, No. 261.*) And for a further plea in this behalf, the defendants say that the plaintiffs ought not to have their aforesaid action against them, the defendants, because they say, that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action; and that by the writing in the said first count mentioned the plaintiffs did covenant that they would, on the payment of the money mentioned in the said writing, convey to the defendants the land in the said writing mentioned, and in and by their deed of conveyance for that purpose would covenant to warrant the title so to be conveyed to the defendants, against any persons claiming by, through or under the patentee of the said land: And the defendants aver that neither at the time of the making of the said writing, nor at any time since, have the plaintiffs been the owners of the patent title to the said land, or had any right or title to the same whatever: And the defendants further aver that the obtaining of the title to the said land was the only consideration and object of the making of the said writing by the defendants as aforesaid: Wherefore, by reason of the plaintiffs' not having any title to the said land, the said covenant in the said writing mentioned was then and there worthless, and the consideration of the said writing has wholly failed. And this the defendants are ready to verify; wherefore they pray judgment, etc.

If in the cause in which this plea was pleaded, the declaration fully set out the contract, then it was unnecessary to allege in the plea that the contract contained a certain covenant, since that already appeared on the record; and if the declaration did not set out the entire writing, so as to show such covenant, then the plea should have set it forth on oyer.

No. 274. Plea of performance generally.

(*As in No. 271, ante, to the asterisk, and then proceed—*) that the defendant did from time to time, and at all times, after the making of the said writing obligatory and the said condition thereof, well and truly keep and perform all and singular the matters and things in the said condition specified, on his part to be kept and performed, according to the tenor and effect of the said condition: And this, etc. (*concluding with a verification, as in No. 271, ante.*)

As to this plea, see the remark following the next form.

A defendant can not plead performance of the condition, without praying oyer, and setting it out *in hæc verba*.¹ But where the condition is already set out in the declaration, or in a previous plea craving oyer, it is unnecessary to again demand oyer, and set it out.

A plea of performance generally, to a declaration making negative averments in assigning breaches, is not good.²

* No. 275. *Plea of non damnificatus.*

(As in No. 271, ante, to the asterisk, and then proceed—) that the plaintiff has not, at any time since the making of the said writing obligatory and condition thereof hitherto, been in anywise damnified by reason of any matter or thing in the said condition mentioned: And this, etc. (*concluding with a verification, as in No. 271, ante.*)

As to craving oyer, see the remark under the preceding form.

It would seem that performance generally, and *non damnificatus*, should, properly, only be pleaded where the condition and breach are not set forth in the declaration. In Illinois, it is provided by statute that “in actions brought on penal bonds, conditioned for the performance of covenants, the plaintiff shall set out the conditions thereof, and may assign as many breaches as he may think fit;”³ and it is the practice, in all actions on bonds with conditions, to set out the condition, and assign the breaches, in the declaration, instead of making such assignment in the replication, as was the practice in England in many cases.⁴

A plea of *non damnificatus* is good only when the action is upon an indemnity bond.⁵ It is sufficient when the condition of the bond is merely to indemnify, but when the condition is for the performance of any particular act, the performance must be specially pleaded.⁶

¹ *Arlington v. Merrick*, 2 Saund. 409, n. 2; 3 Chit. Pl. 986, n.

² *State v. Levaele*, 3 Blackf. 117; *Mix v. People*, 86 Ill. 329; *Mix v. People*, 92 Ill. 549.

³ Rev. Stat. (1893), 1074; Rev. Stat. (1895), 1158; Starr & Curtis 1786; see

Patrick v. Rucker, 19 Ill. 428; *Foltz v. Stevens*, 54 Ill. 180.

⁴ See 3 Chit. Pl. 1177-1179.

⁵ *State v. Gresham*, 1 Ind. 190; *Sears v. Nagles*, 18 Bradw. 547; *Coombs v. Newlan*, 4 Blackf. 120.

⁶ *Cutler v. Southern*, 1 Saund. 117,

No. 276. *Plea—To debt on a demise, for rent—No rent in arrear.* (See No. 241, ante.)

(As in No. 271, ante, to the asterisk, and then proceed—) that no part of the said rent in the said declaration mentioned is in arrear or unpaid, in manner and form as the plaintiff has above in his said declaration alleged: And of this the defendant puts himself upon the country, etc.

This plea may be pleaded in debt for rent, though not in covenant.¹ But as *nil debet* may be pleaded, which puts in issue the whole declaration, there would seem to be no advantage in pleading *rien en arriere*. It was formerly held that this plea should conclude “and so the defendant does not owe,” etc. (*nil debet*.)

An eviction may either be pleaded, or given in evidence upon *nil debet*, in debt, but in covenant it must be pleaded.²

No. 277. *Plea—To declaration on arbitration bond—No award made.*

(As in No. 271, ante, to the asterisk, and then proceed—) that the said arbitrators named in the said condition did not, nor did any two of them, on or before the said — day of, etc., mentioned in the said condition, make any award in writing, under their hands, or the hands of any two of them, (*this must be according to the averment in the declaration*,) of and concerning the premises in the said condition mentioned, and so referred as aforesaid, ready to be delivered to the said parties in difference: And this the defendant is ready to verify; wherefore he prays judgment, etc.

See observation as to oyer, under No. 271, ante.

No. 278. *Plea of eviction in an action by landlord against tenant.*

(First, *nil debet*, and second, *actio non*.)

And for a further plea in this behalf, the defendant says *actio non*, because he says that the plaintiff, after the making of the said lease, and before any part of the said rent in the said declaration mentioned became due and payable, the plaintiff, to wit, on, etc., with force and arms, etc., entered into and upon the said demised premises, and then and there ejected, expelled, put out, and amoved the defendant from the possession thereof, and kept and continued the defendant so ejected, expelled, put out, and amoved from thence hitherto, to wit, at, etc., aforesaid. And this the defendant is ready to verify, wherefore he prays judgment, etc.³

G. H., Att’y for Def’t.

n. 1; 3 Chit. Pl. 985, n.; *Andrus v. Warring*, 20 Johns. 153.

¹ 1 Chit. Pl. 423; Cowp. 588; 1 Rich. C. P. 500.

² 1 Chit. Pl. 423; 3 Chit. Pl. 993;

Salmon v. Smith, 1 Saund. 204, n. 2.

³ *Dean v. Cover*, 2 Saund. 297, n.

1; Ld. Raym. 1503; *Salmon v. Smith*, 1 Saund. 204, n. 1, 2.

*No. 279. Replication denying eviction.**(Venue, and title of cause.)*

And the plaintiff as to the said plea of the defendant by him — above pleaded, says, *precludi non*, because he says that the plaintiff did not, before the said rent became due, eject, expel, put out, or amove the defendant from the possession of the said demised premises, or any part thereof, in manner and form as the defendant has above in his said plea in that behalf alleged; and this the plaintiff prays may be inquired of by the country, etc.

E. F., Att'y for Pl'ff.

No. 280. Plea—To declaration on replevin bond—That merits were not determined in replevin suit, etc.

(First plea, non est factum, as ante, No. 261.) And for a further plea in this behalf, as to any damages by reason of the said supposed breach (or "breaches") of the said condition of the writing aforesaid, except as to the sum of one cent, the defendants say that the plaintiff ought not to have his aforesaid action against them, the defendants, to recover any greater damages than that sum, because they say, that (*here state enough of the proceedings in the replevin suit to show that the merits were not determined in the trial thereof—for example as follows—*) the said judgment in the said action of replevin, in the said declaration mentioned, was given upon a trial of that action, in the said court, at the said — term thereof, in the said year 18—; and that the said trial was had solely upon a certain issue joined upon a certain replication of the said C. D. to a certain plea of the said J. K. (*the defendant in replevin*) denying the jurisdiction of the said court in that behalf (which said issue was then and there found for the said J. K.), and upon no other issue whatsoever: And so the defendants say, that the merits of the case were not determined in the trial of the said action of replevin. And the defendants further say, that the said goods and chattels in the said writ of replevin mentioned, at the said time when, etc., were the property of the said C. D., and not of the said J. K., as by the said declaration in this behalf is above supposed. And this the defendants are ready to verify: wherefore they pray judgment if the plaintiff ought to have his aforesaid action to recover against them any greater damages than the said sum of one cent, in this behalf, etc.

It is provided by statute, in Illinois, that, "in all actions upon replevin bonds, where the merits of the case have not been determined in the trial of the action of replevin in which the bond was given, the defendant may plead the above facts, and also his or her title to the property in dispute in said action of replevin."¹

¹2 Starr & Curtis 2018; Rev. Stat. see *Richards v. Rape*, 3 Bradw. (1893) 1174; Rev. Stat. (1895) 1258; 24; *Ledford v. Weber*, 7 Bradw.

In *King v. Ramsey*, 13 Ill. 619, the court say: "Enough of the proceedings in the former action should be set forth to enable the court to decide on demurrer whether the right of property has already been determined. If the suit was dismissed, that fact should be stated. If there was a trial the plea ought to show what were the issues, and how they were disposed of. The plea was also defective in professing to answer the entire cause of action. Even if the goods replevied belonged to the plaintiffs in the action of replevin, and the right of property was not determined in that suit, the obligee would still have a cause of action on the bond, and be entitled to recover nominal damages for a failure to make return of the goods, as required by the judgment of the court."

No. 281. *Plea—To debt on statute—Former conviction for same offense.*

(*First plea, nil debet, as ante, No. 260.*) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, that after the committing of the said offense in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc., in, etc., aforesaid, one E. F. went before G. H., Esq., then and still being one of the justices of the peace in and for the said county, and informed the said G. H. that the defendant, on, etc., in, etc., did, etc. (*here state the offense, as in the complaint*); and thereupon such proceedings were had before the said G. H., the justice aforesaid, that afterwards, to wit, on, etc., the defendant was there duly convicted of the said offense, according to the form of the statute in such case made and provided; which said judgment of conviction is yet in full force and effect: And the defendant avers that he, the defendant, who is sued by the name of C. D. in this suit, and the said C. D. in the said complaint and conviction named, are one and the same person, and not other or different; and that the said offense in the said declaration mentioned, and the said offense in the said complaint charged, and whereof the defendant was so convicted as aforesaid, were done and committed by the defendant at one and the same time, and are in fact the very same offense, and not other or different offenses. And this he is ready to verify; wherefore he prays judgment, etc.

In an action for a penalty, where any person may prosecute,

87; *King v. Ramsey*, 13 Ill. 619; *Chinn v. McCoy*, 19 Ill. 604; *Lemen v. Robinson*, 59 Ill. 115; *Steverson v. Earnest*, 80 Ill. 513; *Morehead v. Yeazel*, 10 Brad. 263; *O'Donnell v. Colby*, 153 Ill. 324; *Webber v. Mick*, 131 Ill. 520; *Holler v. Coleson*, 23 Ill. App. 324; *Hanchett v. Gardner*, 138 Ill. 571.

a judgment in a suit by A. may be pleaded in bar to a prosecution by B. for the same cause or offense.¹

Demurrer, after craving oyer.—In some cases, where the plaintiff in the declaration partially states a deed which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, thereby making it a part of the declaration, and then demur either in respect of the defect in the deed, or the improper manner in which the plaintiff has stated it; and this is the proper course, when upon oyer it would appear that a bail bond is defective. So a deed untruly stated in a plea, being set out upon oyer by the plaintiff, becomes part of the plea, and if it thereby appears that the plea is false, the plaintiff need not show any matter of fact in his replication to maintain his action, but may demur; for it is a general rule that an indenture set out upon oyer becomes part of the preceding plea.²

When it is desired to crave oyer and demur to a declaration, proceed as in form No. 263, *ante*, or in the remark thereunder, setting out the indenture, etc., and then say:

“Which being read and heard, the defendant says that the said declaration, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law,”—and so on, as in an ordinary demurrer.

Oyer is craved and granted by the court, where some writing is in possession of the opposite party;³ but not of an instrument not under seal;⁴ or of a record.⁵

For replications, rejoinders and demurrers, the pleader is referred to the forms in chapter III, entitled, *Defenses to an Action*.

¹ *Crosby v. Gipps*, 16 Ill. 352; see *R. R. Co. v. Allen*, 39 Ill. 205; *Hamilton v. Quimby*, 46 Ill. 90; *Kreuchi v. Dehler*, 50 Ill. 176.

² 1 Chit. Pl. 578; Gould's Pl. 409, 419; see 1 Chit. Pl. 424, 425; *Ferrall v. Shaen*, 1 Saund. 295, b; *Ross v. Parker*, 1 B. & C. 358.

³ *Eddy v. Brady*, 16 Ill. 307; *Hanna v. Yocum*, 17 Ill. 387.

⁴ *Gatton v. Dimmitt*, 27 Ill. 400; *Ins. Co. v. Mehlman*, 48 Ill. 313.

⁵ *Giles v. Shaw*, Breese 219; *Hanna v. Yocum*, 17 Ill. 387; *Deeme v. Crume*, 46 Ill. 69; see *Young v. Campbell*, 5 Gilm. 80; *Linder v. Monroe*, 33 Ill. 388; *Brent v. Shock*, 36 Ill. 125; *Bowman v. Wood*, 41 Ill. 203.

CHAPTER XIV.

HABEAS CORPUS.

Origin and history of the writ.—The writ of *habeas corpus* is an ancient English writ, used for a variety of purposes from a remote antiquity. One of the purposes for which it was used was to recover freedom which had been wrongfully taken away. Personal liberty was always asserted by the common law, from its earliest ages; and it was always assailed by kings who would be tyrants, and with an earnestness proportioned to their tyranny. Hence it became necessary to declare this principle in the most solemn manner in Magna Charta (A. D. 1215). But before the 31st year of the reign of Charles II. (A. D. 1679,) its benefits were in a great degree eluded by time-serving judges, who awarded it only in term time, and who assumed a discretionary power of awarding or refusing it. The writ was evaded by courts and sheriffs who were disposed to support royal and ministerial usurpations; and it became so powerless, that early in the reign of Charles I. (1626.) the court of king's bench formally decided that it had no power to release any person imprisoned without any cause assigned, if he was imprisoned by the express command of the king, or by the lords of the privy council. The petition of rights, of the third year of the reign of Charles I. (A. D. 1628,) asserted the illegality of this decision, and declared that "no freeman should be imprisoned or detained without cause shown, to which he may make answer according to law." But the means of enforcing this rule were still imperfect, and personal liberty was still violated; and by 16 Charles I., chap. 10, (A. D. 1641,) various provisions were enacted, intended to make the writ of *habeas corpus* more effectual. But this was not enough. The judges still continued to refuse the writ at their pleasure; and prisoners were sent to distant jails,

and sheriffs and jailers refused to obey it; or if the person imprisoned was brought before an examining court, his liberty was still denied him on frivolous pretenses. To secure the full benefits of the writ to the subject, the statute of 31 Charles II., chap. 2, (1679,) commonly called the *habeas corpus* act, was passed. This gave to the writ the vigor, life and efficacy requisite for the due protection of the liberty of the subject. This act consisted of a variety of provisions, devised with so much skill, and so well adapted to give each other mutual support, that it may safely be asserted that personal liberty will be safe, in England and the United States, so long as this law remains in force. Evasion of it is almost impossible; and it can be made ineffectual only by a positive and open violation of its essential provisions, or by a distinct denial of its interposition. The enactment of this great "paladium" of English liberty was secured after persistent efforts on the part of Lord Shaftesbury and other friends of liberty in parliament. The bill only passed the House of Lords by an erroneously reported vote of fifty-seven to fifty-five. It is alleged by a cotemporary writer that it was passed by a foolish jest and falsehood.¹ The manner of its passage is related to have been as follows: The bill had passed the House of Commons, and was taken to the House of Lords. When the question was about to be taken in that house, "Lords Grey and Norris were named to be the tellers. Lord Norris, being a man subject to vapors, was not at all times attentive to what was doing. So a very fat lord coming in, Lord Grey counted him for ten, as a jest only at first; but seeing Lord Norris had not observed it, he went on with his misreckoning of ten, and so it was reported to the house, and declared that they who were for the bill were in a majority, though it indeed went on the other side." Shaftesbury, who presided as Lord Chancellor, then spoke until members had come and gone, so that the house could not be retold, and the mistake corrected. The bill was approved by the king, and became a law. Lord Campbell, in his life of Lord Shaftesbury, says that there must have been some mistake in the return of the votes upon the bill,

¹ Bishop Burnet's History of His Own Times.

because the journal of the House of Lords shows that the whole number of lords present was one hundred and seven, while the bill was declared passed by fifty-seven to fifty-five.

Although this great act may have been procured by a jest and unfair means, and at a period of turbulence and disorder, it is one of the most salutary measures ever passed by the British parliament, and renders the year 1679 a most important era in the history of constitutional liberty.

The *habeas corpus* act has been substantially incorporated into the jurisprudence of every state in the Union;¹ and the right to the writ has been secured by the constitutions of most of the states, and by that of the United States.

The constitution of the United States, art. 1, sec. 9, par. 2, provides, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

By the statute of Illinois, the benefit of the writ of *habeas corpus* is given in all cases where "any person shall be committed or detained for any criminal or supposed criminal matter," and where "any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his liberty, under any color or pretense whatever." And in order to still further secure to the citizen the benefit of this writ, a heavy penalty is imposed upon any judge, empowered to grant such writ, if he corruptly refuses, or unreasonably delays, so to do; and upon any sheriff, jailer or other person who refuses or evades obedience to such writ.²

The statute of Illinois will be understood as referred to, when any statutory provision is hereafter quoted or mentioned in this chapter.

When it is to be granted.—The writ is to be granted whenever a person is in actual confinement, or restrained of his liberty, under any color or pretense whatever. Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner,

¹ *Hammond v. People*, 32 Ill. 446.

² 1 Starr & Curtis 1253; Rev. Stat. (1893) 799; Rev. Stat. (1895) 846, 848.

in which the restraint is effected.¹ Words may constitute an imprisonment, if they impose a restraint upon the person, and he is accordingly restrained and submits.² It may be on the public street, and though the party is not put into any prison or house.³ Whenever a person is deprived of the privilege of going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint, whether by a sheriff, constable, or private individual, is illegal and wrongful. It is not necessary that the degradation of being incarcerated in a prison should be undergone, to entitle any citizen, who may consider himself unjustly charged with a breach of the laws, to a hearing.⁴

A mere moral restraint, however, is not such an imprisonment as will entitle the party to the writ.⁵ Persons discharged on bail will not be considered as restrained of their liberty, so as to be entitled to a writ of *habeas corpus*.⁶ It is immaterial whether the imprisonment is under criminal or civil process; if it is illegal, the prisoner is entitled to the benefit of the writ.⁷

The court has power, on *habeas corpus*, to determine the question of the right to the custody of a child.⁸ Before a writ of *habeas corpus* is granted, sufficient probable cause must be shown. If it appears, upon the petitioner's own showing, that there is no sufficient ground, *prima facie*, for his discharge, the court will not issue the writ. It ought not to be granted if the court is satisfied that the prisoner should be remanded.⁹

In the United States, the right of bail has been thought

¹ Hurd on Hab. Corp. 209; 1 Kent 631.

² 1 Kent 631; Butler N. P. 62; *Pike v. Hanson*, 9 N. H. 491; *Williamson v. Lewis*, 39 Penn. State 9; see *Wales v. Whitney*, 114 U. S. 564.

³ Hurd on Habeas Corpus, 210.

⁴ *Commonwealth v. Ridgeway*, 2 Ashm. (Pa.) 247; Hurd Hab. Corp., 210.

⁵ *Dodge's Case*, 6 Mart. (La.) 569; *Wales v. Whitney*, 114 U. S. 564.

⁶ 1 Bouv. Law D. 574; *State v.*

Arnold, 3 Yeates 263; *Com. v. Robinson*, 1 S. & R. 356; *Territory v. Cutler*, 1 McCahon (Kan.) 152.

⁷ *Hecker v. Jarrett*, 3 Binn. 404; *People v. Turner*, 55 Ill. 280; *People v. Whitson*, 74 Ill. 20.

⁸ *State v. Richardson*, 40 N. H. 272; 1 Geo. Decis. 93; *Ex parte Ferrier*, 103 Ill. 367.

⁹ *Sim's Case*, 7 Cush. 285; 2 M. & S. 428; 3 Black. 132; see *Ex parte Klepper*, 26 Ill. 532; *In re O'Connor*, 6 Wis. 288.

worthy of constitutional protection. In the federal constitution, and in the constitutions of nearly all the states, it is provided that "excessive bail shall not be required."

The constitution of Illinois provides, that "all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great."¹

Where bail, in a bailable case, has been refused by the committing magistrate, the writ of *habeas corpus* may be granted for the sole purpose of admitting the prisoner to bail.² And so when excessive bail has been exacted, and it appears from the petition that the bail is unreasonable, the judge may, in the plenitude of that power which he possesses at common law, in the sound exercise of his discretion, reduce the bail to a reasonable amount.³

If an affidavit for a *capias ad respondendum*, in an action *ex contractu*, does not conform to the requirements of the constitution (of Illinois), a person imprisoned under the *capias* may be discharged on a *habeas corpus*.⁴

By whom application may be made.—Although the person imprisoned has an undoubted right to make the application, it is not necessary that it should proceed directly from him. It may be made by an agent, or friend, on behalf of the prisoner;⁵ or by a wife on behalf of her husband;⁶ or a husband on behalf of his wife.⁷ But no legal relation is required to exist between the prisoner and the person making the application. It may be made by any one.⁸ Where the application is by a third person, it is supposed to be made in accordance with the wishes of the person restrained of his liberty,

¹ Art. 2, Sec. 7, Const. of Ill.

² 4 Inst. 290; *Ex parte Croom*, 19 Ala. 561; *Com. v. Keeper*, 2 Ashm. (Pa.) 227; *Ex parte Taylor*, 5 Cow. 39; *Jones v. Kelly*, 17 Mass. 116; *Evans v. Foster*, 1 N. H. 374; see *Ex parte Klepper*, 26 Ill. 532; *People v. McLeod*, 1 Hill (N. Y.) 398.

³ *Jones v. Kelly*, 17 Mass. 116; *Hurd's Hab. Corp.* 449; see *People v. Town*, 3 Scam. 19.

⁴ *Ex parte Salisbury*, 16 Ill. 350;

People v. Hanchett, 111 Ill. 90; *Ex parte Smith*, 16 Ill. 347.

⁵ 14 How. St. Tr. 814; Rev. Stat. (1893) 797; 1 Starr & Curtis 1253; Rev. Stat. (1895) 846.

⁶ *Hurd's Hab. Corp.* 211; *Cobbett v. Hudson*, 10 Eng. C. L. R. 318.

⁷ *Gregory's case*, 4 Burr. 1991; *Hurd's Hab. Corp.*, 211; *People v. Mercein*, 8 Paige 47.

⁸ *The Hottentot Venus Case*, 13 East 195; *State v. Philpot*, Dudley (Ga.) 42.

and is allowed to prevent delay, where the latter is represented to be under any disability, or in any manner prevented from making the application in his own right.¹ But mere volunteers, who do not appear on behalf of the prisoner, or show some right to represent him, will not be heard.²

The writ may be granted at the instance of a parent for his child,³ a guardian for his ward,⁴ a master for his apprentice,⁵ or a special bail for his principal.⁶

Section 24 of the statute, entitled "Lunatics," provides that "when a patient, committed to the insane hospital, shall be restored to reason, he will be discharged, and that if he be detained afterward, contrary to his wishes, he shall have a writ of *habeas corpus*."⁷

The writ of *habeas corpus* does not lie to review a judgment at law, for an alleged error in the proceedings in a case where the court had jurisdiction of the subject-matter and of the person.⁸ A writ of error will not lie to review the finding of the court below upon a writ of *habeas corpus*.⁹

To whom application may be made.—In Illinois, the application for a writ of *habeas corpus* may be made to the supreme or circuit courts in term time, or any judge thereof in vacation.¹⁰ Masters in chancery, in their respective counties, have power, in the absence of the judge from the county, to order the issuing of writs of *habeas corpus*.¹¹ They have, however, no power to issue writs; but they may, by indorsement on the application, order the clerk of the circuit court to issue such writs. The writ should not be made returnable before the

¹ Hurd's Hab. Corp., 212.

² *Rex v. Clark*, 3 Burr. 1363; *Ex parte Child*, 29 E. C. L. R. 259; *Linda v. Hudson*, 1 Cush. 335.

³ *People v. Mercein*, 3 Hill 399; *People v. Mercein*, 8 Paige Ch. 47.

⁴ *Commonw. v. Dowens*, 24 Pick. 227; *Commonw. v. Hammond*, 10 Pick. 274; *Hovey v. Morris*, 7 Blackf. 559.

⁵ *People v. Pillow*, 1 Sanf. 672.

⁶ *Halsey v. Trevillo*, 6 Watts 402; *Anon v. Pennington*, 484; *Bond v. Isaac*, 1 Burr. 339.

⁷ Rev. Stat. (1893) 949; Rev. Stat. (1895) 1011; 2 Starr & Curtis 1573; *People v. Gilbert*, 115 Ill. 59.

⁸ *Ex parte Smith*, 117 Ill. 63; *People v. Allen*, 160 Ill. 400.

⁹ *People v. Skinner*, 19 Ill. App. 332; *People v. Gilbert*, 57 Ill. App. 505.

¹⁰ Starr & Curtis 709; Rev. Stat. (1893) 436; Rev. Stat. (1895), 478; *Matson v. Swanson*, 131 Ill. 255.

¹¹ 2 Starr & Curtis, 1598; Rev. Stat. (1893), 962; Rev. Stat. (1895), 1024.

master, but to the circuit or supreme court, if in session, or, in vacation, before some judge of one of those courts.¹

It is not for the applicant to select, at will, the judge to whom he will apply, and then compel the officer holding him in custody to convey him to another part of the state. The application should be made to the judge in the county or district where the prisoner is detained,² or, in case of his absence, to the master. A judge of another circuit will not entertain the application, unless special reasons are shown for his so doing.

Form of application.—If the prisoner is committed or detained for a criminal or supposed criminal matter, the application must be in writing, and signed by the prisoner, or some person on his behalf, setting forth the facts concerning his imprisonment, and in whose custody he is detained; and it must be accompanied by a copy of the warrant or warrants of commitment, or an affidavit that such copy has been demanded of the person in whose custody the prisoner is detained, and by him refused or neglected to be given.³

When any person, not committed or detained for any criminal or supposed criminal matter, is confined or restrained of his liberty, under any color or pretense whatever, the application for the writ must be in writing, signed by such person, or some other on his behalf, setting forth the facts concerning his imprisonment, and wherein the illegality of such imprisonment consists, and in whose custody he is detained; and the application or petition must be verified by the oath or affirmation of the party applying, or some other person on his behalf. If the confinement or restraint is by virtue of any judicial writ or process, or order, a copy thereof must be annexed to the petition, or an affidavit made that such copy has been demanded and refused.⁴

A petition for a writ of *habeas corpus*, where the prisoner has been regularly committed, should set forth the evidence adduced before the examining magistrate, so that the court

¹ *People v. Town*, 3 Scam. 19.

⁴ 1 Starr & Curtis 1253; Rev. Stat. (1893) 797; Rev. Stat. (1895) 846.

² *Ex parte Ellis*, 11 Cal. 222.

³ 1 Starr & Curtis, 1253; Rev. Stat. (1893) 797; Rev. Stat. (1895), 846.

may act advisedly. The affidavits of the petitioner and his counsel, giving their opinions, will not be sufficient. The court will presume that the committing magistrate acted properly upon the evidence submitted, and will sustain his proceedings, preferring to rely upon the presumptions in favor of the conduct of the magistrate, rather than to take the opinions of the accused or his counsel.¹

No. 282. Petition for a habeas corpus, where petitioner is detained without warrant, etc.

To the circuit court of the county of —, in the State of Illinois (*or, in vacation, "To the honorable J. K., judge of the — judicial circuit of the State of Illinois"*).

Your petitioner, A. B., of, etc., complaining, shows that he is detained and imprisoned by C. D., sheriff of the *said* county of —, without any authority of law, for a supposed criminal matter, the precise nature whereof is to the petitioner unknown. And your petitioner further shows that he has demanded of the said C. D. a copy of the warrant or warrants for the commitment of the petitioner, but the said C. D. has hitherto refused, and still refuses, to deliver such copy to the petitioner; and he believes that the said C. D. has no warrant whatever for the commitment or detention of the petitioner, but merely detains him on suspicion that he may be guilty of some criminal offense.

Your petitioner therefore prays a writ of *habeas corpus* in this behalf, to be directed to the said C. D., and returnable forthwith, according to the form of the statute in such case made and provided.

A. B.

STATE OF ILLINOIS, }
County of —, } *sect.*

A. B., the petitioner in the foregoing petition named, makes oath and says, that the matters and things in the said petition contained are true, to the best of his knowledge, information and belief.

A. B.

Subscribed and sworn, etc.

A verification of the petition by affidavit, though usual, would seem not to be required by the statute, where the detention is for any criminal or supposed criminal matter. But if a copy of the warrant has been refused, that fact must be shown by affidavit.²

¹ *Ex parte Klepper*, 26 Ill. 532;
Platt v. Harrison, 6 Clarke (Iowa)
79; see *In re O'Connor*, 6 Wis. 288;
Ex parte Thompson, 93 Ill. 89.

² See *Hurd's Hab. Corp.* 218; 1
Starr & Curtis 1253; *Rev. Stat.* (1893)
797; *Rev. Stat.* (1895) 846.

No. 233. *Petition for a habeas corpus, where petitioner is detained under a warrant of commitment.*

(*Address, as in last precedent.*) The petitioner, A. B., of, etc., complaining, shows that he is detained and imprisoned in the jail of the *said* county of —, by C. D., sheriff and jailer of the said county, on a charge of *larceny*, by virtue of a certain warrant for the commitment of the petitioner, a copy whereof is hereto annexed; which detention and imprisonment of the petitioner are unjust, and contrary to law.

And the petitioner further shows that the evidence on which his said commitment was based was in substance as follows, that is to say: (*Here give the substance of the evidence. Any other matters, or grounds of discharge, may be likewise set forth.*)

To be relieved from which said detention and imprisonment the petitioner now applies, praying that a writ of *habeas corpus*, to be directed to the said C. D., may issue in this behalf, pursuant to the statute in such case made and provided, so that the petitioner may be forthwith brought before this court, (or, “your honor,”) to do, submit to and receive what the law may require.

A. B.

(*An affidavit may be added, as in last precedent; and annex copy of warrant.*)

No. 234. *Petition for habeas corpus, by a parent for a child.*

(*Address, as in No. 232, ante.*) The petitioner, A. B., of, etc., complaining, shows that E. F., aged — years, the daughter of the petitioner, is restrained of her liberty by C. D., of, etc.; and that the said E. F. is not detained for any criminal or supposed criminal matter. And the petitioner further shows, that (*here set forth the facts concerning the detention, and wherein the illegality thereof consists, etc.*)

The petitioner therefore prays a writ of *habeas corpus*, pursuant to the statute in such case made and provided, to be directed to the said C. D., commanding him to bring the said E. F. forthwith before the court here, (or “your honor”), and to show the cause of her detention, etc.

A. B.

(*Add affidavit, as in No. 232, ante.*)

No. 235. *Petition for a habeas corpus, where petitioner is held under a capias ad respondendum.*

(*Address as in No. 232, ante.*) The petitioner, A. B., of, etc., complaining shows that he is unjustly imprisoned and restrained of his liberty by C. D., sheriff of the *said* county of —, by virtue of a certain writ of *capias ad respondendum*, issued from the — court of the county aforesaid, a copy of which said writ, marked Exhibit A, is annexed to and made a part of this petition. And your petitioner further shows that his said imprisonment and restraint are unlawful, for the reason that the affidavit on which the said writ of *capias* issued was wholly insufficient to authorize the issu-

ing of such writ; as will fully appear by a copy of the said affidavit, marked Exhibit B, annexed to and made a part of this petition.

Wherefore the petitioner prays a writ of *habeas corpus* in this behalf, to be directed to the said C. D., and returnable forthwith, according to the form of the statute in such case made and provided.

A. B.

(Add affidavit as in No. 282, ante.)

By the "act concerning bail in civil cases," (1872), it is provided that "the court in term-time, or the judge in vacation, may, on application, discharge the defendant from arrest, for insufficiency of the affidavit, or *because the facts stated therein are not true*, or other good cause which would entitle him to be discharged upon *habeas corpus*; or in case he has given bail may discharge the same, or reduce the amount thereof, upon good cause shown."¹

No. 286. *Petition for a habeas corpus ad testificandum.*

(Address, as in No. 282, ante.) The petitioner, A. B., respectfully shows that he is the party defendant in a certain cause now pending in said court (or "in the — court of the county of —," to wit, a certain action of —, wherein one C. D. is plaintiff; that the said cause is set for trial in the said court on (or "will probably come on for trial in the said court on or about") the — day of, etc.; that one E. F. is a material witness for the petitioner, in the said cause; and that the said E. F. is now a prisoner in the custody of G. H., sheriff of the said county of —, and therefore the petitioner will be unable to produce the said E. F. as a witness, on the trial of the said cause by ordinary process of law.

Wherefore the petitioner prays a writ of *habeas corpus ad testificandum*, according to the form of the statute in such case made and provided, to be directed to the said G. H., and commanding him that he have the said E. F. before the said court at, etc., on, etc., to testify on behalf of the petitioner, etc.

A. B.

(An affidavit may be added as in No. 282, ante.)

The statute also provides for a *habeas corpus* for the purpose of bringing in a prisoner to be surrendered in discharge of bail, and also for the purpose of discharging a person committed for a contempt in not performing an order or decree for the pay-

¹ Rev. Stat. (1893), 191; 1 Starr & Curtis, 360; Rev. Stat. (1895), 193; *Bruner v. Ingraham*, 1 Scam. 556.

ment of money, where such person is unable to comply with the order or decree, or is unable to endure the confinement.¹

Allowing and issuing of the writ.—If issued by the court, the writ is to be under the seal of the court; if by a judge, under his hand.² Where the writ is allowed by the master, his order, to be indorsed on the application, may be as follows:

No. 287. Master's order for a habeas corpus, in absence of judge.

In the absence of the honorable J. K., judge of this judicial circuit, from this county (and circuit), I do hereby order that a *habeas corpus* issue on the within application, returnable forthwith into the circuit court of the county of — (or “before the said judge, at, etc.,” or, *if the judge is absent from the circuit*, “before the honorable L. M., judge of the — judicial circuit, at, etc.”)

(Date.)

O. P., Master in Chancery
for the county of —.

To R. S., Clerk, etc.

On filing the application, so indorsed, with the clerk of the court whereof the person allowing the writ is master, such clerk will immediately issue the writ.³

No. 288. General form of a writ of habeas corpus.

The People of the State of Illinois:

To the sheriff of the — county (or to A. B., as the case may be).

You are hereby commanded to have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of imprisonment and detention, by whatever name said C. D. shall be called or charged before the — court of — county (or before E. F., judge of, etc.), at, etc., immediately after being served with this writ, to be dealt with according to law; and have you then and there this writ, with a return thereon of your doings in the premises.

Indorsement.—To the intent that no officer, or other person to whom such writ is directed, may pretend ignorance thereof, every such writ shall be indorsed with these words: “By the HABEAS CORPUS ACT.”⁴

Service of writ.—“The *habeas corpus* may be served by the sheriff, coroner, or any constable or other person appointed for

¹ 1 Starr & Curtis 1260; Rev. Stat. (1895) 850.

² See *People v. Toun*, 3 Scam. 19.

⁴ Rev. Stat. (1893) 798; Rev. Stat.

³ 1 Starr & Curtis 1254; Rev. Stat. (1893) 798; Rev. Stat. (1895) 847.

(1895) 847.

that purpose by the court or judge by whom it is issued or allowed. If served by a person not an officer, he shall have the same power, and be liable to the same penalty for non-performance of his duty as though he was sheriff.

“Service shall be made by leaving a copy of the original writ with the person to whom it is directed, or with any of his under officers who may be at the place where the prisoner is detained; or if he can not be found, or has not the person imprisoned or restrained in custody, the service may be made upon any person who has him in custody, with the same effect as though he had been made a defendant therein.”¹

Expenses, etc.—“When the person confined or restrained is in the custody of a civil officer, the court or judge granting the writ shall certify thereon the sum to be paid for the expense of bringing him from the place of imprisonment, not exceeding ten cents per mile, and the officer shall not be bound to obey it unless the sum so certified is paid or tendered to him, and security is given to pay the charges of carrying him back, if he should be remanded: *Provided*, that if such court or judge shall be satisfied that the person so confined or restrained is a poor person, and unable to pay such expenses, then the court or judge shall so certify on such writ, and in such case no tender or payment of expenses need be made or security given as aforesaid, but the officer shall be bound to obey such writ.”

Return of writ.—“The officer or person upon whom such writ is served, shall state in his return, plainly and unequivocally :

1. Whether he has or has not the party in his custody or control, or under his restraint, and if he has not, whether he has had the party in his custody or control or under his restraint at any and what time prior or subsequent to the date of the writ.

2. If he has the party in his custody or control, or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large.

3. If the party is detained by virtue of any writ, warrant

¹ Rev. Stat. (1893), 798; Rev. Stat. (1895), 847.

or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

4. If the person upon whom the writ is served has had the party in his custody or control, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place. The return shall be signed by the person making the same, and except where such person is a sworn public officer and makes the return in his official capacity, it shall be verified by oath."¹

Precedence given to the writ.—The authority of all other writs must yield to the authority of the writ of *habeas corpus*. Therefore, from the moment the sheriff receives such writ, the custody of the petitioner will be by virtue thereof, and not under any other writs he may have previously received.²

No. 289. Return to a writ of habeas corpus, where the prisoner is in custody.

STATE OF ILLINOIS, }
County of ———. } ss.

I, F. H., *sheriff of said county*, to whom the within writ is directed, for return thereto, say that I have the within named C. D. in my custody, and now bring his body in court here as commanded; that the cause of his detention is, etc., (*here set forth the cause of the detention at large, and if in custody by virtue of process, attach a copy*).

(Date.)

F. H., Sheriff of, etc.

No. 290. Return to a habeas corpus denying detention, etc.

STATE OF ILLINOIS, }
County of ———. } ss.

I have not now, and have not had at any time prior or subsequent to the date of the within writ, the custody or control of the within named C. D., wherefore I can not have his body before the court (or "judge") as I am therein commanded.

(Date.)

F. H., Sheriff of, etc.

¹ 1 Starr & Curtis 1255; Rev. Stat. (1893) 798; *People v. Pirfenbrink*, 96 Ill. 68.

² *Matson v. Swanson*, 131 Ill. 255.

No. 291. *Return to a habeas corpus by a party not an officer.*

STATE OF ILLINOIS, }
County of ———. } ss.

I, F. K., to whom the within writ is directed, have now before the court here the body of C. D., therein named, as thereby commanded. And for cause of his detention I aver that, etc. (*here set forth the ground of detention at large*).

(Date.)

F. K.

Add affidavit as follows:

STATE OF ILLINOIS, }
County of ———. } ss.

F. K. makes oath and says that the above return by him made is true to the best of his knowledge, information and belief.

Subscribed, etc.

F. K.

Examination.—"Upon the return of a writ of *habeas corpus*, the court or judge shall, without delay, proceed to examine the cause of the imprisonment or restraint, but the examination may be adjourned from time to time, as circumstances require."

Denial of return, etc.—"The party imprisoned or restrained may deny any of the material facts set forth in the return, and may allege any other fact that may be material in the case, which denial or allegation shall be on oath, and the court or judge shall proceed in a summary way to examine the cause of the imprisonment or restraint, hear the evidence produced by any person interested or authorized to appear, both in support of such imprisonment or restraint and against it, and thereupon shall dispose of the party as the case may require."

"The return, as well as any denial or allegation, may be amended at any time by leave of the court or judge."¹

Causes for discharge.—If it appears that the prisoner is in custody by virtue of process from any court, legally constituted, he can be discharged only for some of the following causes: 1st. Where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum or person. 2d. Where, though the original imprisonment was lawful, yet by some act, omission, or event which has subsequently taken place, the party has become entitled to his discharge. 3d. Where the process is defective in some substantial form required by law.

¹ 1 Starr & Curtis 1256; Rev. Stat. (1893), 799.

4th. Where the process, though in proper form, has been issued in a case, or under circumstances, where the law does not allow process, or orders for imprisonment or arrest to issue. 5th. Where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him. 6th. Where the process appears to have been obtained by false pretense or bribery. 7th. Where there is no general law, nor any judgment, order or decree of a court to authorize the process, if in a civil suit, nor any conviction, if in a criminal proceeding. "No court, or judge, on the return of a *habeas corpus*, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted. In all cases where the imprisonment is for a criminal or supposed criminal matter, if it shall appear to the said court, or judge, that there is sufficient legal cause for the commitment of the prisoner, although such commitment may have been informally made, or without due authority, or the process may have been executed by a person not duly authorized, the court, or judge, shall make a new commitment, in proper form, and directed to the proper officer, or admit the party to bail, if the case be bailable."¹

Where the affidavit for a *capias ad satisfaciendum*, in a civil action, conforms to all the requirements of the constitution and statute, the court will not go behind the *capias* and affidavit, and inquire into the facts charged in the latter.² And the court has no power, on *habeas corpus*, to discharge a person who is imprisoned under a *capias ad satisfaciendum*, upon the mere ground that he was not sued by his right name.³

In the cases of wives, children and wards, all the court does is to see that they are under no illegal restraint.⁴ The object in such cases is not to enforce the right of custody, but to re-

¹ 1 Starr & Curtis 1257; Rev. Stat. (1893), 800; Rev. Stat. (1895), 849; *People v. Foster*, 104 Ill. 156.

² *Ex parte Salisbury*, 16 Ill. 350; see *Hammond v. People*, 32 Ill. 446; *In re Smith*, 117 Ill. 63.

³ *Hammond v. People*, 32 Ill. 446.

⁴ 1 Strange 445; 2 Strange 982; *Matter of Wollstoncroft*, 4 Johns. Ch. 80; *People v. Skinner*, 19 Bradw. 332; *Ex parte Ferrier*, 103 Ill. 367.

move unlawful restraint. The person interested in the custody will be presumed to represent the wishes of the person restrained, so far as to enable him to set the remedial power of the court in motion. But the right, properly speaking, extends no further than that.¹

In the case of infants, an unauthorized absence from the legal custody has been treated, at least for the purpose of allowing a writ of *habeas corpus* to issue, as equivalent to imprisonment; and the duty of returning to such custody as equivalent to a wish to be free. And for all legal purposes a child is in the custody of those with whom it lives.²

A father may obtain the custody of his children, by the writ of *habeas corpus*, where they are improperly detained from him; but the courts, both of law and equity, will investigate the circumstances, and, according to sound discretion, do with the child as its interests may require. Although, in general, parents are intrusted with the custody of the persons, and with the education, of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals, and that they will be treated with kindness and affection; but whenever this presumption is removed, whenever, for example, it is found that a father is guilty of gross ill-treatment or cruelty towards his child, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that his domestic associations are such as tend to the corruption and contamination of his children, in every such case the court will interfere, and deprive him of the custody of his children.³

No. 292. Judge's order of discharge, in vacation.

In the matter of the application of }
 A. B. for a writ of *habeas corpus*. } Be it remembered, that on this
 — day of, etc., in obedience to the writ of *habeas corpus* heretofore allowed
 by me in this behalf, C. D., *sheriff, etc.*, to whom the said writ was directed,

¹ Hurd on Hab. Corp. 450; *Matter of Wollstoncroft*, 4 Johns. Ch. 80; *People v. Mercein*, 8 Paige Ch. 47.

² *Mercein v. People*, 25 Wend. 64; *People v. Mercein*, 8 Paige Ch. 47.

³ Story's Eq. Jur., Sec. 1345; *People v. Mercein*, 8 Paige Ch. 47; *Matter of Wollstoncroft*, 4 Johns. Ch. 80.

appeared before me, at, etc., having with him the body of the said A. B., together with the said writ and the return of him, the said C. D., thereon. And thereupon, the allegations and proofs of the respective parties in this matter having been heard, and fully understood (*), and it appearing that the said A. B., at the time of the issuing and serving of the said writ, was unlawfully detained by the said C. D., and ought not to be remanded to his custody, I do therefore order that the said A. B. be forthwith discharged and set at liberty, and go hence without day, etc.

J. K., Judge.

No. 293. Judge's order, in vacation, remanding prisoner.

(*As in the last precedent, to the asterisk, and thence as follows:*) and it appearing that the said A. B., at the time of the issuing and serving of the said writ, was lawfully detained by the said C. D., for the cause set forth in the said return; and it further appearing that the said A. B. ought not to be discharged, but ought to be remanded to the custody of the said C. D., for the reason that (the said A. B. is probably guilty of feloniously stealing, taking and carrying away, on, etc., in, etc., *one watch*, of the value of — dollars, the property of one G. H.): I do therefore order, that the said A. B. be remanded to the custody of the said C. D., sheriff as aforesaid (*if admitted to bail, add*), unless bail be given by the said A. B. in the sum of — dollars, at which sum the bail in this behalf is fixed.

J. K., Judge.

No. 294. Order of discharge, by the court, in term.

(*Title of cause as in No. 292, ante.*) And now on this day here comes the said C. D., *sheriff, etc.*, to whom the said writ of *habeas corpus* in this behalf was directed, and has now here in court the body of the said A. B., together with the said writ and the return of him, the said C. D., thereon. And thereupon, the allegations and proofs of the respective parties in this matter being heard and examined, and the court being fully advised in the premises: (*) and it appearing to the court that the said A. B., at the time of the issuing and serving of the said writ, was unlawfully detained by the said C. D., and ought not to be remanded to his custody: It is therefore ordered by the court that the said A. B. be forthwith discharged and set at liberty, and go hence without day, etc.

No. 295. Order of court, in term, remanding prisoner, etc.

(*As in the last precedent to the asterisk, and thence as follows:*) and it appearing to the court that the said A. B., at the time of the issuing and serving of the said writ, was lawfully detained by the said C. D., for the cause in the said return mentioned: and it further appearing to the court that the said A. B. ought not to be discharged, but ought to be remanded to the custody of the said C. D., for the reason that (*here set forth the cause or causes for remanding the prisoner*): It is therefore ordered by the court, that the said A. B. be remanded to the custody of the said C. D., sheriff as aforesaid (*if admitted to bail, add*) unless bail be given by the said A. B., in

the sum of — dollars, at which sum the bail in this behalf is fixed. (*If bail is thereupon given, proceed:*) And thereupon the said A. B. as principal, and O. P., as surety, in open court jointly and severally acknowledge themselves to be indebted to the people, etc., etc.

It might be profitable to consider the subject of *habeas corpus* more at length and in detail, but it would be foreign to the plan and purpose of the work. The subject is very fully and learnedly treated in the valuable work usually cited as *Hurd on HABEAS CORPUS*.

CHAPTER XV.

SCIRE FACIAS.

A *scire facias* is a writ founded upon some record; and its office is to make known to the defendant some matter, of which he has a right to be informed, and to afford him an opportunity to show cause why a certain step should not be taken against him.

The *scire facias* against a bail, against pledges in replevin, to repeal letters patent, or the like, is an original proceeding; but when brought to revive a judgment after a year and a day, or upon the death or marriage of the parties, when in the latter case one of them is a woman, or when brought on a judgment *quando*, etc., against an executor, it is but a continuation of the original action.¹

In Illinois, the writ is considered both as process and declaration, and defects therein can be reached by demurrer.² Like all other process, it should run in the name of "the People of the State of Illinois," and if it does not it is void on its face; and the objection can be raised by general demurrer, though the more proper mode is by motion to quash the writ.³

A dissolution of a corporation, for cause of forfeiture, may be effected by *scire facias*, where such corporation is a legal, existing body, but has been guilty of an abuse of the power intrusted to it.⁴

¹ Bouv. L. Dict. 499; Bac. Abr. Ex. H.

² *Smith v. Stevens*, 133 Ill. 183; *Marshall v. Maury*, 1 Scam. 231; *McFadden v. Fortier*, 20 Ill. 509; see Rev. Stat. (1893) 1074; Rev. Stat. (1895) 1158; 2 Starr & Curtis 1789; *Wood v. People*, 16 Ill. 171; *Lawrence v. People*, 17 Ill. 172; *Challenor v. Niles*, 78 Ill. 78; *Compton v.*

People, 86 Ill. 176; *Wilson v. Trustees*, 144 Ill. 29.

³ *McFadden v. Fortier*, 20 Ill. 509; *Reddick v. Cloud*, 2 Gilm. 670; see *Ferris v. Crow*, 5 Gilm. 96.

⁴ *King v. Passmore*, 3 T. R. 245; see *Baker v. Backus*, 32 Ill. 110; *Danville Sem. v. Mott*, 136 Ill. 289; *Com v. Griffin*, 134 Ill. 330.

To make party to judgment.—The statute of Illinois provides, that “if a summons or *capias* is served on one or more, but not on all the defendants, the plaintiff may proceed to trial against the defendant or defendants on whom the process is served, and the plaintiff may, at any time afterwards, have a summons in the nature of *scire facias*, against the defendant not served with the first process, to cause him to appear in said court, and show cause why he should not be made a party to such judgment; and upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally summoned or brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered, and the judgment of the court against such defendant shall be that the plaintiff recover against such defendant, together with the defendant in the former judgment, the amount of his debt or damages, as the case may be.”¹

In Illinois, a writ of attachment may issue in aid of a *scire facias* to make a person party to a judgment, upon the same terms as in other cases mentioned in the attachment act.²

A *scire facias* to make a party to a judgment is not an original action. Such writ may issue at any time, without an order of court.³ The plaintiff may wait until it is found that the amount of the judgment can not be made of the defendant against whom judgment has been rendered.⁴

Scire facias against garnishees.—The statute of Illinois provides that when any person shall have been summoned as a garnishee upon any attachment, or other writ issued out of a court of record, and shall fail to appear or make discovery, as required by the statute, the court may enter a conditional judgment against such garnishee for the amount of the plaintiff's demand, or of the judgment against the original defend-

¹ 2 Starr & Curtis, 1779; Rev. Stat. (1893), 1072; Rev. Stat. (1895) 1156; *Coursen v. Hixon*, 78 Ill. 339.

² 1 Starr & Curtis, 323; Rev. Stat. (1893), 173; Rev. Stat. (1895), 177; *Ryder v. Glover*, 3 Scam. 547.

³ *Tiffany v. Breese*, 3 Scam. 499; *Ryder v. Glover*, 3 Scam. 547; *Coursen v. Hixon*, 78 Ill. 339; *Parker v. Mfg. Co.*, 9 Bradw. 383.

⁴ *Johnson v. Buell*, 26 Ill. 66.

ant; and thereupon a *scire facias* shall issue against such garnishee, returnable at the next term of court, commanding such garnishee to show cause why such judgment should not be made final.¹

Scire facias to revive judgment.—A judgment of a court of record may be revived by *scire facias*, or an action of debt may be brought thereon.² “Judgment in any court of record in this state may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years next after the date of such judgment, and not after.”³ The act of February 14, 1855, which provided that an administrator *de bonis non*, or with the will annexed, might revive, in his own name, a judgment recovered by a deceased executor or administrator,⁴ is repealed by the present statute of wills.⁵

A revival of judgment upon publication and mailing notice as provided in section 26 of the Practice Act would not be valid against a non-resident of the state.⁶

When a judgment debtor dies after the expiration of the seven years' lien provided by the statute of Illinois, his heirs, to whom his real estate descends, can not be divested thereof except in the mode provided by law, by a proceeding to which they are parties. In such case, the creditor may obtain satisfaction of the judgment out of such real estate in the hands of the heirs, by proceeding by *scire facias* to revive the judgment, making the heirs parties, and then suing out an execution upon the judgment of revival, and having the realty sold.⁷

¹ 1 Starr & Curtis, 1224; Rev. Stat. (1893) 782; Rev. Stat. (1895) 831; see *Webster v. Steele*, 75 Ill. 544; *R. R. Co. v. Reynolds*, 72 Ill. 487; *Rickey v. Davis*, 9 Bradw. 362; *R. R. Co. v. Hindman*, 85 Ill. 521.

² 3 Blacks. Com. 421; see *Reynolds v. Henderson*, 2 Gilm. 111; *Scammon v. Swartwout*, 35 Ill. 326; *Gibbons v. Goodrich*, 3 Bradw. 590.

³ 2 Starr & Curtis, 1559; Rev. Stat.

(1893) 942; *Supervisors v. Gordon*, 82 Ill. 435; Rev. Stat. (1895) 1004; *Smith v. Stevens*, 133 Ill. 183.

⁴ Gross' Stat. 811.

⁵ Rev. Stat. (1893) 1396; Rev. Stat. (1895) 1494; Starr & Curtis, 2342.

⁶ *Bickerdike v. Allen*, 157 Ill. 95.

⁷ *Scammon v. Swartwout*, 35 Ill. 326; *Reynolds v. Henderson*, 2 Gilm. 111.

No. 296. Præcipe for a scire facias to revive a judgment.

In the ——— Court.

A. B. }
 vs. } *Assumpsit.*
 C. D. } The clerk of the said court will issue a *scire facias* against the said C. D., to revive the judgment rendered in this behalf against him in the said court, in the ——— term, 18—; such writ to be directed to the sheriff of the county of ———, and returnable to the next term of the said court.

(Date.)

E. F., Attorney for Plaintiff.

To L. M., Clerk, etc.

No. 297. Scire facias to revive a judgment.

The People of the State of Illinois, to the sheriff of the county of ———, greeting :

Whereas A. B. heretofore, in our ——— court of the said county of ———, in the ——— term thereof, in the year 18—, to wit, on, etc., in the same year, by the consideration and judgment of the same court recovered against C. D., in a certain action of ———, the sum of ——— dollars, damages, (or “the sum of ——— dollars, debt, and the further sum of ——— dollars, damages for the detention thereof,” according to the record,) and also the costs of the said A. B. in that behalf, taxed at the sum of ——— dollars, whereof the said C. D. was convicted, as appears to us of record : And now on the behalf of the said A. B. we have been informed, that although judgment was given as aforesaid, yet execution of the damages (or “debt, damages”) and costs aforesaid still remains to be made to him, wherefore the said A. B. has besought us to provide him a proper remedy in this behalf. We do therefore command you, that you make known to the said C. D. that he be before our said ——— court, at the court house in ———, in the county aforesaid, on the ——— Monday of ——— next, to show cause, if any he have, why the said A. B. ought not to have execution against him, the said C. D., of the damages (or “debt, damages”) and costs aforesaid, according to the form and effect of the said recovery : And have you there then this writ.

Witness, R. S., clerk of our said court, and the seal thereof, at ——— aforesaid, this ——— day of ———, in the year 18—.

[L. S.]

R. S.

See a *scire facias* against heirs and terre-tenants, 35 Ill. 377.

It is not necessary that a *scire facias* to revive a judgment should show that no execution issued within one year after the rendition of the judgment.¹

Where a judgment has been obtained by the people, it is

¹ *Albin v. People*, 46 Ill. 372.

not essential that execution should issue within the year, in order to authorize the issuing of execution after ¹that time. But a *scire facias* will lie on such judgment, notwithstanding execution could issue thereon at the same time.²

No. 298. Scire facias to revive a judgment in ejectment.

The People of the State of Illinois, to the sheriff of the county of — greeting :

Whereas, A. B., heretofore, in our — court of said county of —, in the — term thereof, in the year 18—, to wit, on, etc., in the same year, by the consideration and judgment of the same court recovered against C. D. in a certain action of ejectment, a judgment for the following piece or parcel of land, to wit, (*here describe*) which said court found that said C. D. was guilty of unlawfully withholding; and whereas the said court further found (*) the fee simple title to said premises to be in the said A. B., the plaintiff in said action; and whereas the said court therefore ordered that the said A. B., plaintiff, have a writ of possession (*) for said described premises, and that the said A. B. have judgment against the said C. D. for his costs in that behalf, taxed at the sum of — dollars, whereof the said C. D. stands convicted, as appears to us of record; and now on behalf of said A. B. we have been informed that the said judgment remains in full force and effect, unreversed and unsatisfied (**) and that no writ of possession has ever issued in conformity to the said order of court therein, and although said judgment was given as aforesaid, yet no execution upon said judgment or costs hath ever been made, and that execution of said judgment and costs remains to be made to the said A. B., plaintiff; wherefore the said A. B. has besought us to provide him a proper remedy in this behalf. We do therefore command you that you make known to the said C. D. that he be before our said — court, at the court house in — in the county aforesaid, on the — Monday of — next, to show cause, if any he have, why the said A. B. ought not have execution made to him of his said judgment, according to the form and effect of the said recovery; and have you then and there this writ.

Witness, etc.,

R. B., Clerk.

If the recovery was had for a term of years only, omit all between the asterisks in above precedent and insert, in lieu thereof, the following, viz.:

“The plaintiff, the said A. B., to be entitled to his term then and yet to come, of and in the said above described premises, beginning on, etc., and ending on, etc., and the said court therefore ordered that the said A. B., plaintiff, have a writ of possession of his term yet to come.” And insert, also at (**), the following: *“that said title, in said judgment mentioned, has not yet expired.”*

¹ *People v. Peck*, 4 Scam. 404; *Albin v. People*, 46 Ill. 372.

² *Albin v. People*, 43 Ill. 372.

Where the allegations of a *scire facias* to revive a judgment in ejectment affirmatively show that the judgment sought to be revived, not only adjudged the plaintiff to be entitled to the possession of the premises, but also to be the owner thereof in fee simple; that the recovery was not for a term of years, but for the entire estate; that such judgment remained unexecuted, and that execution therein remained to be made to the plaintiff, the same will be sufficient to entitle the plaintiff to judgment of revival. The plaintiff need not allege that he has not parted with his title by conveyance. The *scire facias* need not aver in terms that the title of the plaintiff has not expired, where the judgment recites that the recovery was for the fee simple title, and not for a term of years.¹

The defendant can not avail himself of an outstanding title in a third person. The only defense on the trial of a *scire facias* on a judgment is a denial of the existence of the judgment, or proof of a subsequent satisfaction or discharge thereof. Whether there is an outstanding paramount title in some third person is immaterial.²

Foreclosure of mortgage.—It is provided in section 17 of the chapter entitled “Mortgages,” that

“If default be made in the payment of any sum of money secured by mortgage on lands and tenements, duly executed and recorded, and if the payment be by installments, and the last shall have become due, it shall be lawful for the mortgagee, his assigns, or his or their executors or administrators, to sue out a writ of *scire facias* from the clerk’s office of the circuit court of the county in which the said mortgaged premises may be situated, or any part thereof, directed to the sheriff or other proper officer of any county or counties where the defendants, or any of them, may reside or be found, requiring him to make known to the mortgagor, or, if he be dead, to his heirs, executors or administrators, to show cause, if any they have, why judgment should not be rendered for such sum of money as may be due by virtue of said mortgage; and upon the appearance of the party named as a de-

¹ *Wilson v. Trustees of Schools*,
144 Ill. 29.

² *Smith v. Stevens*, 133 Ill. 183.

fendant in said writ of *scire facias* the court may proceed to judgment as in other cases, but if said *scire facias* be returned *nihil*, or that the defendant is not found, an alias *scire facias* may be issued.”¹

Prior to the amendment of the section quoted by the revision of 1874, an assignee of a mortgage could not have a *scire facias* thereon in his own name;² but the assignment of a note and mortgage did not prevent a foreclosure by this proceeding in the name of the mortgagee for the use of the assignee, the proceedings being upon the record of the mortgage, and not upon the note.

Jurisdiction of foreclosure by a *scire facias* rests upon mortgage duly executed and recorded; and is not impaired by a destruction of the record.³ The relation of a mortgagor and mortgagee is not terminated by such proceedings until the time of redemption expires and the foreclosure is complete; nor can the purchaser maintain a possessory action until the expiration of the period for redemption.⁴

As has been seen from the section quoted, the remedy by *scire facias* to foreclose a mortgage, is now given by statute to the “mortgagee, his assigns, his or their executors or administrators.” It is not essential to the right of an assignee of the mortgage to foreclose by this remedy that the assignment should be acknowledged.⁵

The wife of the mortgagor, if she joined in the mortgage, should be made a party defendant, in order to barequity of redemption and right of dower.⁶ The proceeding by *scire facias* for a foreclosure is a proceeding at law, and is governed by the practice of courts of law, and not of courts of equity. None but the mortgagor, or, in case of his death, his heirs, executors or administrators, should be made parties defendant. Assignees in bankruptcy, subsequent purchasers and mortgagees, etc., are

¹ 2 Starr & Curtis 1642; Rev. Stat. (1893) 989; Rev. Stat. (1895) 1056.

² *Olds v. Cummings*, 31 Ill. 188; *Camp v. Small*, 44 Ill. 37; *Winchell v. Edwards*, 57 Ill. 45; *Bourland v. Kipp*, 55 Ill. 376.

³ *Alvis v. Morrison*, 63 Ill. 181.

⁴ *Rockwell v. Servant*, 63 Ill. 424.

⁵ *Honore v. Wilshire*, 109 Ill. 103; see *Ogle v. Turpin*, 102 Ill. 148.

⁶ *Camp v. Small*, 44 Ill. 37; *Day v. Cushman*, 1 Scam. 475.

bound to take notice of the proceeding, and failing to do so, their rights are not protected.¹

Two returns of *nil* are in general equivalent to a service;² and this rule applies in *scire facias* on a mortgage.³ This remedy applies only to mortgages made to secure the payment of money. It does not extend to mortgages made to secure the delivery of specific articles of property, or the performance of other acts.⁴

The proceeding is *in rem*, to enforce a specific lien, and is not for the purpose of obtaining a judgment *in personam*. The judgment only directs the sale of the mortgaged property, to satisfy the debt and costs, and is not a lien on any other property.⁵

No. 299. *Scire facias on a mortgage.*⁶

The People of the State of Illinois, to the sheriff of the county of —, greeting:

Whereas C. D. and E. D., his wife, on, etc., by their deed of that date, duly executed, did grant, bargain, sell and convey to A. B., his heirs and assigns, a certain parcel of land, situate in the county aforesaid, to wit, (*here describe the land*); to have and to hold the same, with its appurtenances, unto him, the said A. B., his heirs and assigns, forever; and did thereby also release unto him and his heirs and assigns all right of homestead of them, the said C. D. and E. D., in the said parcel of land; yet upon the condition that if the said C. D., his heirs, executors, or administrators, should well and truly pay, or cause to be paid, to the said A. B., his heirs, executors, administrators, or assigns, the sum of — dollars, — — after the date aforesaid, with interest thereon at the rate of — per centum per annum, according to the tenor and effect of a certain promissory note of the said C. D., of the date *first* aforesaid, then the said deed should be void, otherwise should remain in full force; as by the record of the said deed, remaining in the office of our recorder of deeds for the county aforesaid (in which office the said deed was on, etc., duly recorded), more fully appears. And whereas we are informed by the said A. B., that default has been made in the payment of the said sum of money, with the interest

¹ *Chickering v. Failes*, 26 Ill. 507; *Bank v. Wilson*, 4 Gilm. 57.

² *Sans v. People*, 3 Gilm. 327; *Besimer v. People*, 15 Ill. 440; *Choats v. People*, 19 Ill. 63; *Chickering v. Failes*, 26 Ill. 507; see *Lytle v. People*, 47 Ill. 422.

³ *Cox v. McFerron*, Breese 28.

⁴ *McCumber v. Gilman*, 13 Ill. 543.

⁵ *Woodbury v. Manlove*, 14 Ill. 213; *Carpenter v. Mooers*, 26 Ill. 162; see *Osgood v. Stevens*, 25 Ill. 89; *White v. Watkins*, 23 Ill. 480.

⁶ See *Woodbury v. Manlove*, 14 Ill. 213; *Mitchelltree v. Steward*, 2 Scam. 18; *McFadden v. Fortier*, 20 Ill. 509.

thereof, as aforesaid, and that the same, with such interest, is in arrear and unpaid, contrary to the form and effect of the said condition of the deed aforesaid: (*) We do therefore, according to the form of the statute in such case made and provided, command you, that you make known to the said C. D. and E. D. that they be before our circuit court, at the court house in —, in the county aforesaid, on the — Monday of — *next*, to show cause, if any they have, why judgment should not be rendered against them in favor of the said A. B., for such sum of money as may be due by virtue of the said deed: And have you there then this writ.

Witness, R. S., clerk of our said court, and the seal thereof, at — aforesaid, this — day of —, in the year 18—.

[L. S.]

R. S.

If the *scire facias* is against the heirs, etc., of the mortgagor, insert, at the asterisk in the above precedent, an averment like the following: "And whereas we are further informed by the said A. B., that afterwards, to wit, on, etc., the said C. D. departed this life, intestate, leaving him surviving the said E. D., his widow, and F. D. and G. D. his children and heirs at law; and that O. S. was thereupon, by the county court of the county aforesaid, appointed administrator of the estate of the said deceased." The writ will then proceed to command the sheriff to "make known to the said E. D., F. D., G. D., and O. S.," etc.

It is sufficient to set out a copy of the mortgage, with the certificates of acknowledgment and recording annexed, without any direct allegation that the mortgage was acknowledged or recorded.¹ If the mortgage debt is payable by installments, the writ must show that the last installment has become due.² And it must show a breach, by non-payment of the debt, as well as every other substantial matter required in a declaration. If it fails in any of these respects, it is obnoxious to a demurrer.³

No. 300. Another form of scire facias on a mortgage.

The People of the State of Illinois, to the sheriff of the county of — greeting:

Whereas on, etc., a certain deed of mortgage was duly recorded in the

¹ *Mitchelltree v. Steward*, 2 Scam. 18.

² *Day v. Cushman*, 1 Scam. 475; *Osgood v. Stevens*, 25 Ill. 89; see *Mitchelltree v. Steward*, 2 Scam. 18.

³ *Osgood v. Stevens*, 25 Ill. 89; see *Mitchelltree v. Steward*, 2 Scam. 18; *Woodbury v. Manlove*, 14 Ill. 213.

office of our recorder of deeds for the county aforesaid, which said deed, as appears by us to the record thereof, remaining in the said office, is in these words and figures, that is to say: (*Here insert a copy of the mortgage.*)

And whereas we are informed by the said A. B. that default has been made in the payment of the sum of money and interest in the said deed mentioned, and that the same are in arrear and unpaid, contrary to the form and effect of the said deed.

We do therefore, according to the form of the statute in such case made and provided, command you (*as in the last precedent to the end*).

On recognizances.—The statute of Illinois provides that “in all cases of bail for the appearance of any person or persons charged with any criminal offense, the security or any of them may, at any time before default upon the bond or recognizance, surrender the principal in their exoneration or the principal may surrender himself to the proper officer.

“When any person who is accused of any criminal offense shall give bail for his appearance, and such person does not appear in accordance with the terms of the recognizance, the court shall declare such recognizance forfeited, and the clerk of the court shall thereupon issue a *scire facias* against such person and his sureties, returnable on the first day of the next term of the court, to show cause why such judgment should not be rendered against such person and his sureties for the amount of the recognizance, which *scire facias* shall be served by the sheriff of the county where the court is held, upon such person and his sureties, by reading the same to the defendants named in such *scire facias*, at least five days before the first day of the term to which the same is returnable, and, in case the person aforesaid cannot be found by the sheriff, he shall make return of that fact to the court. The court shall thereupon enter judgment by default against the defendants for the amount of the recognizance, unless defendant shall appear and defend such cause; and if the defendant shall appear and interpose a defense, then the case shall be tried in the same manner as other cases of a like nature, after any such recognizance shall be declared forfeited as aforesaid. Before judgment, the court may, in its discretion, set aside such forfeiture, upon the accused being brought or coming into court, and showing to the court, by affidavit, that he was unable to appear in court according to the terms of the recognizance, by

reason of sickness or some other cause which shall satisfy the court that the accused had not been guilty of any *laches* or negligence: *Provided*, that no such forfeiture of a recognizance shall be set aside until the accused shall pay the costs of such recognizance."¹

An offer to pay costs is not a literal compliance with the statute requiring the accused to pay all costs made on the recognizance before a default is set aside; and even if the court has the power to permit the costs to be paid after the entry of a motion to set aside the forfeiture, the statute has made the setting aside the same discretionary.²

A recognizance, conditioned that the principal shall be and appear before the court, etc., on the first day of the term thereof to be holden at, etc., to answer unto a certain crime (stating it,) and abide the order of the court, and not depart without leave, requires the accused to appear on the first day of the next term, and from day to day during the term, and from term to term, and from day to day of each term, until the final sentence or order of the court, to answer the specified charge. And a forfeiture may be declared, even though two terms may have elapsed from the time to which the principal was required to appear.³

No. 301. *Scire facias on a recognizance made in open court, after indictment found.*

The People of the State of Illinois, to the sheriff of the county of —, greeting :

Whereas heretofore, in the — term of our — court of the *said* county of —, in the year 18—, C. D., J. K. and L. M. personally came into our said court, and then and there jointly and severally acknowledged themselves to be indebted to us in the sum of — dollars, to be levied of their respective goods and chattels, lands and tenements, as the law directs; yet upon the condition that if the said C. D. should personally appear before our said court, on the first day of the then next term thereof, to answer to a certain indictment therein pending against him for —, and should not depart our said court without leave, and should abide the order of the same

¹ Starr & Curtis 847; Rev. Stat. (1893) 525; Rev. Stat. (1895) 568; see *Lane v. People*, 76 Ill. 300; *Welborn v. People*, 76 Ill. 516; *McElwee v. People*, 77 Ill. 493; *Adams v. People*, 12

Bradw. 380; *Reese v. People*, 11 Bradw. 346.

² *Gallagher v. People*, 88 Ill. 335; *People v. McFarland*, 9 Bradw. 275.

³ *Gallagher v. People*, 88 Ill. 335.

in the premises, then the said recognizance was to be void, and otherwise to remain in full force, as by the record of the said recognizance, remaining in our said court, more fully appears. And whereas afterward, in the — term of our said court, in the *same* year [being the term next after the making of the said recognizance as aforesaid], such proceedings were thereupon had in our said court, in that behalf, that the said C. D. was three times solemnly called in open court, yet he came not, but made default; and the said J. K. and L. M. were each then and there likewise three times solemnly called, and required to bring into court the body of the said C. D., yet they, the said J. K. and L. M. also made default, and failed to bring into court the body of the said C. D.; and thereupon it was then and there considered and adjudged by our said court that the said recognizance should be taken for and declared forfeited, and that a writ of *scire facias* should issue in that behalf against the said C. D., J. K. and L. M., as by the record and proceedings thereof, remaining in our said court, more fully appears. We therefore command you, that you make known to the said C. D., J. K. and L. M. that they be before our said — court, at the court house in —, in the said county of —, on the — Monday of — *next*, to show cause, if any they have, why execution should not be awarded against them upon the said recognizance, so declared forfeited as aforesaid, for the sum of money therein mentioned. And have you there then this writ.

Witness, R. S., clerk of our said court, and the seal thereof, at — aforesaid, this — day of —, in the year 18—. [L. S.] R. S.

See the cases of *Vancil v. The People*, 16 Ill. 120, *scire facias* on a recognizance taken by the sheriff; *Van Blaricum v. The People*, 22 Ill. 86, *scire facias* on a recognizance taken by a sheriff on the granting of a *supersedeas*; and *Gingrich v. The People*, 34 Ill. 448, *scire facias* on recognizance taken by a justice of the peace.

Two returns of *nihil*, in *scire facias* on a recognizance, are equivalent to actual service.¹

Before the passage of the statute of Illinois (act of 1869) above quoted, a judgment could not properly be rendered against both the principal and surety, where the former had not been served, unless there had been two returns of *nihil*, or his appearance had been entered.²

It is indispensable to a legal default and declaration of for-

¹ *Sans v. People*, 3 Gilm. 327; *Besimer v. People*, 15 Ill. 440; *Choat v. People*, 19 Ill. 63; *Chickering v. Failes*, 26 Ill. 507.

² *Lytle v. People*, 47 Ill. 422; *Petty v. People*, 118 Ill. 148.

feiture of a recognizance, that the principal should have been regularly called, and upon such call failed to appear.¹

A writ of *scire facias* upon a recognizance should clearly show before what court the recognizance was entered into, and for what offense the principal in the recognizance was indicted; also, that a judgment of forfeiture was entered² prior to the commencement of the proceeding for judgment.³ It must be sufficient on its face to entitle the People to recover the amount of the recognizance, or it will be obnoxious to a demurrer.⁴ An indictment need not be set out in such writ,⁵ and it is not necessary to aver or prove that one was ever found.⁶

The recognizance of record and judgment of forfeiture are competent and sufficient evidence, under appropriate averments in the *scire facias*, to authorize judgment of execution according to the form, force and effect of the recognizance.⁷

The recognizance may be stated according to its legal effect, or it may be set out *verbatim*, leaving the court to decide on its effect.⁸ Where the recognizance was entered into before a justice of the peace, or other officer, and not in open court, the writ should show, by proper recitals, that the recognizance legally became a matter of record.⁹

A *scire facias* on a recognizance to appear from day to day, until discharged, to answer, etc., is good, although it does not show that any indictment was found against the principal.¹⁰

The writ should issue against the principal and the sureties, and not against the sureties alone.¹¹

Where a *scire facias* recites that the persons before whom the recognizance was entered into were justices of the peace for the county in which it was taken, the court will presume,

¹ *Brown v. People*, 24 Ill. App. 72.

² *Thomas v. People*, 13 Ill. 696; see *Bacon v. People*, 14 Ill. 312; *Kennedy v. People*, 15 Ill. 418; *Conner v. People*, 20 Ill. 381; *Eubank v. People*, 50 Ill. 496; *Petty v. People*, 118 Ill. 148.

³ *Brown v. People*, 24 Ill. App. 72.

⁴ *Wood v. People*, 16 Ill. 171.

⁵ *Chumasero v. People*, 18 Ill. 405.

⁶ *Kepley v. People*, 123 Ill. 367.

⁷ *Ibid.*

⁸ *Lawrence v. People*, 17 Ill. 172.

⁹ *Shadley v. People*, 17 Ill. 252; see *McFarland v. People*, 13 Ill. 9.

¹⁰ *Wheeler v. People*, 39 Ill. 430; *People v. O'Brien*, 41 Ill. 303; *O'Brien v. People*, 41 Ill. 456; but see *Piercy v. People*, 10 Bradw. 219.

¹¹ *Alley v. People*, 1 Gilm. 109; *Banta v. People*, 53 Ill. 434; see *Chumasero v. People*, 18 Ill. 405.

on demurrer, that the charge was regularly preferred and examined, and the proper adjudication made by the justices, before the recognizance was acknowledged.¹

Defenses to scire facias.—A *scire facias* is considered, in Illinois, both as a process and a declaration; and if defective, the defendant may demur,² or move to quash the writ.³

The defendant may plead *nul tiel record*, which puts in issue the existence of the record upon which the proceeding is based; and under this plea he may take advantage of any variance between the record produced in evidence and the one recited in the writ.⁴ See the form of this plea in debt, *ante*, No. 494, and the remarks thereunder.

In a plea in bar to a *scire facias* (except on a mortgage), instead of *actionem non*, etc., the defendant says that the plaintiff ought not to have *execution* against him, etc.; and the plea concludes with a prayer of judgment if the plaintiff ought to have *execution* against him, etc.

To a *scire facias* on a judgment, nothing can be pleaded in bar which might have been pleaded to the original action,⁵ nor anything contrary to the title on which the recovery was obtained, or which shows only that the judgment was erroneous or voidable;⁶ nor can the defendant plead the pendency of a writ of error on the same judgment.⁷

To a *scire facias* on a mortgage, the defendant can not plead usury,⁸ or a total or partial failure of consideration or a want of consideration,⁹ or fraud, as it is said,¹⁰ or a set-off.¹¹

¹ *McFarland v. People*, 13 Ill. 9; see *Pate v. People*, 15 Ill. 223.

² *Marshall v. Maurry*, 1 Scam. 231; *McFadden v. Fortier*, 20 Ill. 509.

³ *McFadden v. Fortier*, 20 Ill. 509; see *Reddick v. Cloud*, 2 Gilm. 670; *Ferris v. Crow*, 5 Gilm. 96.

⁴ *Compton v. People*, 86 Ill. 176; *Farris v. People*, 58 Ill. 26; *Slaten v. People*, 21 Ill. 28; *Mooney v. People*, 81 Ill. 134; *Allen v. People*, 29 Ill. App. 555.

⁵ *Cooke v. Jones*, Cowp. 728; *Wilcox v. Mills*, 4 Mass. 218; 1 Chit. Pl. 427; *McFarland v. Irwin*, 8 Johns. 77; *Green v. Ovington*, 16 Johns. 55;

R. R. Co. v. Marshall, 85 Penn. St. 187.

⁶ Com. Dig. Plead. 3 L. 10.

⁷ 4 Mod. 247; see *contra*, Show. 86; Skin. 590.

⁸ *Camp v. Small*, 44 Ill. 37; *Carpenter v. Mooers*, 26 Ill. 162.

⁹ *Hall v. Byrne*, 1 Scam. 140; *Woodbury v. Manlove*, 14 Ill. 213; *White v. Watkins*, 23 Ill. 426; *Fitzgerald v. Forrestal*, 48 Ill. 228.

¹⁰ *White v. Watkins*, 23 Ill. 426; see *Dorr v. Munsell*, 13 Johns. 430; *Franchot v. Leach*, 5 Cow. 506.

¹¹ *Woodbury v. Manlove*, 14 Ill. 213.

So a plea alleging the assignment of the note and mortgage to a third person, before the issuing of the writ, is not a good plea in bar.¹ "The mortgage, being recorded, is treated as a record, importing absolute verity, against which nothing in the shape of a defense can be averred except that it was void *ab initio*, and never a valid lien, or that it has been discharged or released."² A *scire facias* on a mortgage is not an *action*.³

The plea of *non est factum* is not a good plea to a *scire facias*, which is always founded on a record.⁴

It may be shown, in defense to a *scire facias* on a recognizance, that the performance of the condition was rendered impossible by the act of God, or of the law, or of the cognizee.⁵ But where the sureties in a recognizance pleaded (1) that the principal, after his discharge on bail, and before the term of the court at which he was bound to appear, without their knowledge or consent, enlisted as a private in the military service of the United States, and was ordered into another state, where he still remained, under military authority, not at liberty to surrender himself, nor could his sureties arrest and surrender him, in satisfaction of the recognizance, and that they could not procure his custody by *habeas corpus* or otherwise; and (2) that at the time of the taking of the forfeiture, and for a long time before, the principal was, and at all times since has been, in another state, and was sick and disabled, insomuch that he could not be removed, or brought and surrendered to the court or any officer by his sureties, without great danger of the loss of his life, the pleas were regarded as not presenting any good defense. It was held, however, that the same matters, substantially, set forth in an affidavit, showed good grounds for a continuance.⁶

In another case, the surety pleaded that the principal was in the service of the United States at the time he was arrested;

¹ *Bourland v. Kipp*, 55 Ill. 376.

² *Carpenter v. Mooers*, 26 Ill. 162; *White v. Watkins*, 23 Ill. 426; *Camp v. Small*, 44 Ill. 37.

³ *Carpenter v. Mooers*, 26 Ill. 162; *Woodbury v. Manlove*, 14 Ill. 213.

⁴ *Johnson v. People*, 31 Ill. 469; *Camp v. Small*, 44 Ill. 37.

⁵ Co. Lit. 206, a; Bac. Abr. Cond. 2; *Mather v. People*, 12 Ill. 9; *Piercy v. People*, 10 Brad. 219; *Hangsleben v. People*, 89 Ill. 164.

⁶ *Gingrich v. People*, 34 Ill. 448.

that after giving bail he was held to such service, and taken by the military authorities to another state, and was prevented by reason thereof from appearing according to the terms of the recognizance; and that by reason of his being so held by the military authorities in another state, it was out of the power of the surety to surrender him, and out of his power to appear, etc. It was held, on demurrer, that the plea was bad, and that the principle of *vis major* did not apply in such a case.¹

But in Illinois the death of the principal in any recognizance after forfeiture thereof, but before judgment rendered upon the *scire facias* issued thereon, may be pleaded by the sureties in discharge of such recognizance.² A plea that the sureties in the recognizance surrendered their principal after the forfeiture thereof, and before the issuing of the *scire facias* thereon, is bad on demurrer.³

The plea of *nul tiel recognizance* is not a proper plea in *scire facias* upon a recognizance. The action being upon a record, is fully met by the plea of *nul tiel record*.⁴

¹ *Huggins v. People*, 39 Ill. 241; *Starr & Curtis* 841; *People v. Gingrich v. People*, 34 Ill. 448. *Meacham*, 74 Ill. 292.

² *Mather v. People*, 12 Ill. 9; 1 ³ *Hangsleben v. People*, 89 Ill. 164.

⁴ *Mooney v. People*, 81 Ill. 134.

CHAPTER XVI.

MANDAMUS.

Nature of writ.—A writ of mandamus is a command issuing in the name of the sovereign authority, from a superior court having jurisdiction, and is directed to some person, corporation or inferior court, within the jurisdiction of such superior court, requiring him or them to do some particular thing therein specified which pertains to his or their office and duty, and which the superior court has previously determined, or at least supposed to be consonant to right and justice.¹

Award of, discretionary with court.—It is not a writ of right but is only granted in the discretion of the court to which the application for it is made; and this discretion is not exercised in favor of the applicant unless some just and useful purpose may be answered by the writ.²

Purpose of writ.—This writ was introduced to prevent disorders from a failure of justice; and therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in good justice and good government there ought to be one.³

Prior to the revision of the statute it was held that it would

¹ 2 Bouv. Law Dict. 100; *Carpen-ter v. Co. Com.* 21 Pick. 258.

² *People v. Davis*, 93 Ill. 133; *People v. Hatch*, 33 Ill. 9; *People v. Lieb*, 85 Ill. 484; *People v. R. R. Co.*, 55 Ill. 95; *People v. I. C. R. R. Co.*, 62 Ill. 510; *R. R. Co. v. Co. Clerk*, 74 Ill. 27; *People v. Ketchum*, 72 Ill. 212; *Com. Yorktown v. People*, 66 Ill. 339; *Cristman v. Peck*, 90 Ill. 150; *Watch v. Pearson*, 140 Ill. 425; *People v. Williams*, 55 Ill.

178; *People v. Solomon*, 51 Ill. 39; *People v. Curyea*, 16 Ill. 547; *Swigert v. Hamilton Co.*, 130 Ill. 538; *People v. Trustees*, 42 Ill. App. 60; *North v. Trustees*, 137 Ill. 296; *People v. McConnell*, 146 Ill. 532.

³ *Rex v. Barker*, 3 Burr. 1267; *Mendon v. County*, 10 Pick. 235; *Johnson v. Randall*, 7 Mass. 340; *People v. Thorp*, 12 Wend. 183; *Kendall v. U. S.*, 12 Pet. 524; *Rex v. Directors*, 12 East 429.

be granted only where there was no other remedy,¹ or where it was doubtful whether there was another effectual remedy,² or where the court did not see its way clearly to one.³ But it is provided by section 9 of the present statute on mandamus, that the proceeding shall not be dismissed, nor the writ denied because the petitioner may have another specific and sufficient remedy.⁴

To entitle a party to the writ, he must show a clear legal right to have the act sought by it done, and in the manner and by the defendant sought to be coerced; that it is the defendant's imperative duty to perform the act; that such act is within the defendant's power to perform, and the case must be one in which the remedy would be effectual.⁵

If the amount or the right involved presents an issue of fact, it must be referred to the arbitrament of a jury, or to the ordinary process of the courts.⁶

It will never be awarded in a doubtful case, or where it will prove barren or fruitless, or can not have a beneficial effect,⁷ or can be of no substantial or practical benefit to the petitioner.⁸

¹ *School Board v. People*, 20 Ill. 525; *People v. Hatch*, 33 Ill. 9; *Tap. on Mandamus* 18; *People v. Cover*, 50 Ill. 100; *People v. Supervisors*, 50 Ill. 213; *People v. Warfield*, 20 Ill. 159; *People v. Solomon*, 46 Ill. 415; *City of Ottawa v. People*, 48 Ill. 233; *People v. Common Council*, 53 Ill. 424; *State Board v. People*, 20 Bradw. 457.

² *City of Ottawa v. People*, 48 Ill. 233; *Ry. Co. v. People*, 56 Ill. 365; *People v. Solomon*, 51 Ill. 39.

³ *Tap. on Mandamus* 19; *People v. Cummings*, 25 Ill. 325.

⁴ *Starr & Curtis' An. Stat.* 1588; *Rev. Stat.* (1893) 958; *Rev. Stat.* (1895) 1020; *Ry. Co. v. People*, 121 Ill. 483.

⁵ *People v. R. R. Co.*, 55 Ill. 95; *People v. Lieb*, 85 Ill. 484; *People v. Forquer*, 1 Breese (Beecher) 104; *People v. Glann*, 70 Ill. 232; *People v. Crotty*, 93 Ill. 180; *Lavalle v. Soucy*, 96 Ill. 467; *People v. Dulaney*,

96 Ill. 503; *Com. v. People*, 99 Ill. 587; *People v. Johnson*, 100 Ill. 537; *Johnson v. People*, 8 Bradw. 395; *Swigert v. Hamilton Co.*, 130 Ill. 538; *Watch Co. v. Pearson*, 140 Ill. 425; *Dement v. Rokker*, 126 Ill. 174; *R. R. Co. v. Suffern*, 129 Ill. 274; *People v. Getzendaner*, 137 Ill. 234; *North v. Trustees*, 137 Ill. 296; *People v. McConnell*, 146 Ill. 532; *People v. Ruby*, 59 Ill. App. 653; *Buckley v. Eisendrath*, 58 Ill. App. 364; *Railroad Co. v. People*, 132 Ill. 559; *People v. Com.*, 118 Ill. 239.

⁶ *People v. Getzendaner*, 137 Ill. 234.

⁷ *Swigert v. Hamilton Co.*, 130 Ill. 538; *Watch Co. v. Pearson*, 140 Ill. 425; *Dement v. Rooker*, 126 Ill. 174; *Brokaw v. Comm.*, 130 Ill. 482; *North v. Trustees*, 137 Ill. 296; *People v. Trustees*, 42 Ill. App. 60.

⁸ *Gormley v. Day*, 114 Ill. 185; *Aff v. Hopkins*, 57 Ill. App. 529.

The absence or want of any other adequate and specific remedy is not, of itself, sufficient to lay the foundation for interference by *mandamus*.¹

A *mandamus* is a proper remedy for the people, where a public officer refuses to perform a duty required of him by law.²

In all matters requiring the exercise of official judgment, resting in the sound discretion of the person to whom a duty is confided by law, *mandamus* will not lie, either to control the exercise of that discretion, or to determine the decision which shall be finally given.³

While it is true that *mandamus* will not lie to compel the performance of acts or duties which necessarily call for the exercise of judgment on the part of the officer or body at whose hands their performance is required, yet if a discretionary power is exercised with manifest injustice, or such discretion is grossly abused, or exercised from selfish and unworthy motives, the courts are not precluded from commanding its due and proper exercise. Such abuse of discretion will be controlled by *mandamus*.⁴

Where the object of the writ is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the law executed and the right in question enforced.⁵ A *mandamus* can only be awarded to compel a person to perform an act when it is his duty to do so without it.⁶

¹ *People v. Garnett*, 130 Ill. 340.

² *People v. Johnson*, 100 Ill. 537; *Iroquois Co. v. Bates*, 61 Ill. 490; *People v. Ry. Co.*, 118 Ill. 113; *Hyde Park v. Thatcher*, 13 Bradw. 613; *People v. County*, 125 Ill. 334.

³ *Ottawa v. People*, 48 Ill. 233; *School Board v. People*, 20 Ill. 526; *People v. Hilliard*, 29 Ill. 413; *St. Clair Co. v. People*, 85 Ill. 396; *People v. McKee*, 5 Gilm. 242; *People v. Com.*, 118 Ill. 239; *People v. Com.*, 158 Ill. 197; *North v. Trustees*, 137 Ill. 296; *Hubbard v. Anthony*, 129

Ill. 218; *Sayer v. Garnett*, 130 Ill. 340; *People v. Trustees*, 42 Ill. App. 60.

⁴ *State Board v. People*, 123 Ill. 227; *Brokaw v. Com.*, 130 Ill. 482; *People v. Com.*, 158 Ill. 197; *Peotone v. Adams*, 61 Ill. App. 435.

⁵ *People v. Board of Education*, 127 Ill. 613.

⁶ *People v. McKee*, 5 Gilm. 243; *People v. Hatch*, 33 Ill. 9; *People v. Bd. of Sup.*, 45 Ill. 162; *People v. Salomon*, 46 Ill. 333; *People v. Miner*, 46 Ill. 384; *Ottawa v. People*, 48 Ill.

If it is doubtful whether the person has by law a right to do such act or not, the writ will be denied.¹

When it will lie.—Where one has been elected to a public office, a *mandamus* will be awarded to compel his predecessor to deliver possession of the office, but the right to the permanent enjoyment of the office is not determined in such proceeding.²

Where a person is in possession of an office and exercising the duties thereof, with a color of right, *mandamus* will not be awarded. The proper remedy is *quo warranto*.³

Mandamus will lie to compel an officer to give notice of an election,⁴ or to announce the result of an election;⁵ to compel a railway company to deliver grain to an elevator;⁶ but not off its own line;⁷ to compel a board of supervisors to submit a proposition for subscription to a railway company to a vote of the people;⁸ to compel a city to maintain, open and close bridge;⁹ to compel a city to pay a judgment against it;¹⁰ to compel a city to open street;¹¹ or to repair streets;¹² to compel the issue of a dram-shop license, wrongfully refused under a general ordinance;¹³ to compel the issue of bonds;¹⁴ and to

233; *County v. People*, 85 Ill. 396; *School Trustees v. People*, 71 Ill. 559; *People v. Glann*, 70 Ill. 232; *Com. v. People*, 66 Ill. 339; *Klokke v. Stanley*, 109 Ill. 192; *People v. Ruby*, 59 Ill. App. 653.

¹ *People v. Forquer*, Breese 104; *People v. Hatch*, 33 Ill. 9; *People v. Head*, 25 Ill. 325; *People v. R. R. Co.*, 55 Ill. 95; *People v. Cline*, 63 Ill. 394; *People v. Supervisors*, 88 Ill. 202; *Supervisors v. People*, 16 Bradw. 305; *People v. Comm.*, 118 Ill. 239; *Sup. Stark Co. v. People*, 118 Ill. 459.

² *People v. Head*, 25 Ill. 325; *Delehanty v. Warner*, 75 Ill. 185; see *People v. Kilduff*, 15 Ill. 492.

³ *People v. Trustees*, 42 Ill. App. 60; *People v. Forquer*, Breese 104; *People v. Matteson*, 17 Ill. 167; *People v. Hilliard*, 29 Ill. 413; see chapter on *Quo Warranto*.

⁴ *People v. Trustees*, 51 Ill. 149; *People v. Thompson*, 155 Ill. 451.

⁵ *People v. Salomon*, 46 Ill. 415.

⁶ *Ry. Co. v. People*, 56 Ill. 365.

⁷ *People v. R. R. Co.*, 55 Ill. 95; see *Hoyt v. R. R. Co.*, 93 Ill. 601.

⁸ *People v. Logan Co.*, 45 Ill. 162.

⁹ *Ottawa v. People*, 48 Ill. 233.

¹⁰ *Olney v. Harvey*, 50 Ill. 453; *Chicago v. People*, 48 Ill. 416; *Chicago v. Sansum*, 87 Ill. 182; *People v. Sup. Clark Co.*, 50 Ill. 213; *Chicago v. O'Hara*, 60 Ill. 413; *Cook v. Comm.*, 61 Ill. 115; *Cairo v. Campbell*, 116 Ill. 305; *R. R. Co. v. St. Anne*, 101 Ill. 151; *Cairo v. Everett*, 107 Ill. 75; *Bd. of Auditors v. People*, 38 Ill. App. 239.

¹¹ *Webster v. Chicago*, 83 Ill. 458.

¹² *People v. Mayor*, 63 Ill. 207.

¹³ *People v. F. W. Co.*, 60 Ill. App. 395.

¹⁴ *People v. Logan Co.*, 63 Ill. 374;

compel the stopping of railway trains at county seats;¹ or to compel a corporation to keep its records at its principal office or place of business.² Where city authorities, without legal excuse, refuse a permit to a railroad company to lay tracks across a street, *mandamus*, and not injunction, is the remedy.³

A clerk of a court may be compelled by *mandamus* to administer an oath of office, and file an official bond, and deliver a commission to an officer, when it is by law the duty of such clerk so to do.⁴ And it is the proper proceeding against an ex-mayor, to compel him to deliver to the mayor-elect the seal, books, papers, etc., of the corporation.⁵

A *mandamus* will lie to compel a circuit judge to sign a bill of exceptions, when a correct one is presented in apt time,⁶ and where his decision is not final;⁷ to compel a judge to try a person indicted for murder;⁸ to compel a clerk to issue an execution;⁹ or an officer to execute a deed which it is his duty to execute;¹⁰ or overseers of the poor to perform their duties in respect to contracts for supporting or rendering medical services to paupers;¹¹ or a county judge to make an order appointing appraisers to assess damages, when the law requires him to do so;¹² or commissioners of highways to perform their

People v. Sup., 67 Ill. 62; *R. R. Co. v. St. Anne*, 101 Ill. 151; *People v. Bishop*, 111 Ill. 124.

¹ *I. C. R. R. Co. v. People*, 143 Ill. 434.

² *Tow Co. v. Thomas*, 60 Ill. App. 234.

³ *Ry. Co. v. Chicago*, 159 Ill. 369.

⁴ *People v. Fletcher*, 2 Scam. 482; *Ross v. People*, 78 Ill. 375; *People v. Dulaney*, 96 Ill. 503.

⁵ *People v. Kilduff*, 15 Ill. 492; *Taylor v. Henry*, 2 Pick. 397; *Tap. on Mand.* 94.

⁶ *People v. Pearson*, 3 Scam. 270; *People v. Jamison*, 40 Ill. 93; *People v. Pearson*, 2 Scam. 189; *Weatherford v. Wilson*, 2 Scam. 253; *Hulett*

v. Ames, 74 Ill. 253; *People v. Pendergast*, 117 Ill. 588; *People v. Williams*, 91 Ill. 87; *People v. Blades*, 10 Bradw. 17; *People v. Anthony*, 129 Ill. 218; *Hawes v. People*, 129 Ill. 123; *People v. Hawes*, 25 Ill. App. 326; *People v. Donnelly*, 59 Ill. App. 413.

⁷ *People v. Smith*, 51 Ill. 177.

⁸ *People v. Zane*, 105 Ill. 662.

⁹ *People v. Cloud*, 2 Scam. 362; *Allen v. Conlon*, 2 Bradw. 166.

¹⁰ *Marey v. Clabaugh*, 1 Gilm. 26; *Klokke v. Stanley*, 109 Ill. 192; *People v. Ryan*, 16 Bradw. 347.

¹¹ *Rouse v. Peoria Co.*, 2 Gilm. 99.

¹² See *Graham v. People*, 111 Ill. 253; *People v. Zane*, 105 Ill. 662.

duties in regard to the making of roads, etc.;¹ or to compel school trustees to lay out a new school district.²

Will not lie.—It is not a proper proceeding to try the question of the location of a public highway, as between the public and the land holders over whose land such highway is to be laid out.³ It will not be granted to compel the governor to return a legislative bill to the secretary of state;⁴ nor to compel the state treasurer to pay a warrant in gold coin when there is no gold in the treasury belonging to the particular fund on which the warrant is drawn.⁵

It does not lie to compel reinstatement of member of board of trade;⁶ nor to compel the performance of an enjoined act;⁷ nor to compel the performance of an executory contract;⁸ nor to compel the granting of a change of venue.⁹ It does not lie at the relation of a mere taxpayer to compel supervisors to comply with contract with third persons;¹⁰ nor to compel county officers to levy tax to pay county orders;¹¹ nor to compel highway commissioners to open road before right of way has been obtained;¹² nor to compel judge to refer cause to a particular master.¹³

Jurisdiction.—The supreme court,¹⁴ and the respective appellate,¹⁵ and the circuit courts of Illinois,¹⁶ have power to issue

¹ See *People v. Comm.*, 52 Ill. 498; *Comm. v. People*, 31 Ill. 97; *Hall v. People*, 57 Ill. 307; *People v. Comm.*, 88 Ill. 141; *Sheaft v. People*, 87 Ill. 189; *People v. Dent*, 110 Ill. 180; *Supervisors v. People*, 110 Ill. 511; *Klein v. People*, 31 Ill. App. 302; see *People v. Com.*, 32 Ill. App. 164; *Com. v. Jackson*, 61 Ill. App. 381; *Com. v. Watts*, 61 Ill. App. 634.

² *School Directors v. School Directors*, 135 Ill. 464; *Haines v. People*, 19 Bradw. 354; *People v. Comm.*, 158 Ill. 197.

³ *People v. Curyea*, 16 Ill. 547; see *Comm. v. People*, 31 Ill. 97; *People v. Supervisors*, 111 Ill. 527.

⁴ *People v. Yates*, 40 Ill. 126; *People v. Bissell*, 19 Ill. 229; *People v. Cullom*, 100 Ill. 472.

⁵ *People v. Beveridge*, 37 Ill. 307; *People v. Sect'y of State*, 58 Ill. 90; *Comm. v. Snyder*, 15 Bradw. 645.

⁶ *People v. Board of Trade*, 80 Ill. 134.

⁷ *People v. Hake*, 81 Ill. 540.

⁸ *People v. Dulaney*, 96 Ill. 503.

⁹ *People v. McRoberts*, 100 Ill. 458.

¹⁰ *People v. Vermilion Co.*, 47 Ill. 256.

¹¹ *People v. Clark Co.*, 50 Ill. 213.

¹² *Com. v. People*, 4 Brad. 391.

¹³ *People v. Williams*, 55 Ill. 178.

¹⁴ Sec. 2, Art. VI. Const.

¹⁵ 1 Starr & Curtis 702; Rev. Stat. (1893) 433; Rev. Stat. (1895) 475.

¹⁶ 1 Starr & Curtis, 709; Rev. Stat. (1893) 436; Rev. Stat. (1895) 478.

writs of *mandamus*; but the circuit courts can not issue writs to operate beyond the limits of their respective circuits.¹

The relator.—The question as to who shall be the relator (or petitioner) in an application for a *mandamus* depends upon the object to be attained by the writ. When the remedy is resorted to for the purpose of enforcing a private right the relator must be the person interested in having the right enforced. The relator is considered the real party, and his right to the relief must clearly appear. But where the object is the enforcement of a public right, the people is regarded as the real party, and the relator need not show he has any legal interest in the result. It is enough that he is interested as a citizen, in having the laws executed, and the duty in question enforced.²

A petition for *mandamus* by a private person must clearly show that the petitioner has a personal interest in the thing he seeks to compel to be done, and that he has been injured in his personal interests by the refusal of the defendants to perform a duty imposed upon them by law.³ A private person may apply for a *mandamus* to enforce a public duty not due to the government as such, without the intervention of the government law officer.⁴

Proceedings—Summons.—Section 1 of chapter 87 of the revised statutes,⁵ entitled *Mandamus*, is as follows: "That upon the filing of a petition for a *mandamus*, the clerk of the court shall issue a summons, in like form as other summons in suits at law, commanding the defendant to appear at the return term thereof, and show cause why a writ of *mandamus* should not be issued against him. If the summons is issued in vacation it shall be returnable on the first day of the next term; or in term time, it may be made returnable on any day of the term not less than five days after the date of the writ."

¹ *Welch v. People*, 38 Ill. 20; see *Sandbury v. Papineau*, 81 Ill. 446.

² *Pike Co. v. State*, 11 Ill. 202; *Ottawa v. People*, 48 Ill. 233; *Thatcher v. People*, 98 Ill. 635; *People v. Supervisors*, 47 Ill. 256; *People v. Trustees*, 86 Ill. 613; *Glencoe v. People*, 78 Ill. 382.

³ *North v. Board of Trustees*, 137 Ill. 296.

⁴ *North v. Board of Trustees*, *Ibid.*

⁵ Rev. Stat. (1893), 957; Rev. Stat. (1895), 1020; Starr & Curtis An. Stat. 1584.

The tenth section of the Practice Act of 1872 is as follows: "It shall not be necessary hereafter, in any action of *mandamus* or *quo warranto*, to set out the cause of action in the writ, but it shall be sufficient to summon the defendant in a summons in the usual form, commanding the defendant to appear and answer the plaintiff in an action of *mandamus* or *quo warranto*, as the case may be, and the issues shall be made up by answering, pleading or demurring to the petition as in other cases."¹

By the section above quoted, the issuing of an alternative writ of *mandamus* setting out the cause of action, is in effect dispensed with; and it is sufficient "to summon the defendant in a summons in the usual form;" and the issues are to be made up as in other cases.²

Before this statute, the petitioner was required to give notice of the application; and if the petitioner presented a proper case, *prima facie*, an alternative writ of *mandamus* issued, commanding the defendant to do the thing required, or to show cause to the court why it should not be done. This writ then served the same purpose as a declaration in an ordinary cause; and the defendant might move to quash it, or demur to it, or make a return denying the allegations thereof, or setting up new matter constituting a defense to the relator's claim;³ and if the defendant neglected to make any answer or return to the alternative writ a peremptory writ would issue, without any rule against him to return the alternative writ.⁴

Demand.—Where the duty sought to be enforced by *mandamus* is of a merely private nature, affecting only the right of the relator, a demand is necessary to lay the foundation for relief by *mandamus*. But if the duty, the performance of which is sought to be enforced, is a public duty, resting upon the respondents by virtue of their office, no such demand and refusal are necessary.⁵

¹ Rev. Stat. (1893), 1072; 2 Starr & Custis, 1780; Rev. Stat. (1895), 1156.

² *Com v. Gibson*, 7 Bradw. 231; *People v. Glann*, 70 Ill. 232; *People v. Crabb*, 156 Ill. 155.

³ See *Canal Trustees v. People*, 12 Ill. 248; *People v. Hatch*, 33 Ill.

9; *People v. Kilduff*, 15 Ill. 492; *People v. Davis*, 93 Ill. 133; *Silver v. People*, 45 Ill. 224.

⁴ *People v. Pearson*, 2 Scam. 187; *People v. Pearson*, 3 Scam. 283.

⁵ *People v. Bd. of Ed.*, 127 Ill. 613; *People v. Mt. Morris*, 137 Ill.

The demand may be made by the petitioner, or by some one duly authorized, and personally upon those from whom the duty, etc., is required.¹

Requisites of petition.—It is a familiar rule of universal application to a proceeding by *mandamus*, that the petition must set forth distinctly all the material facts on which the relator relies, so that the same may be reversed or admitted. It must set forth a clear right on the part of the relator to have the act performed, and set forth every material fact, showing it is the duty and within the power of the persons sought to be coerced to do the act.²

The statute dispensing with the alternative writ does not relieve the relator from the common law requirement of showing a clear and indubitable right to the relief demanded.³

The petition under our practice takes the place of a declaration in ordinary actions at law and it is not necessary or even permissible to plead mere evidence.⁴

Default, answer, etc.—Sec. 2 provides that "Every defendant who shall be served with summons shall be held to show cause by answer to the petition, or to demur thereto, on the return day of the summons, or within such further time as may be allowed by the court; and in default thereof, judgment may be taken *nil dicit*, and a peremptory *mandamus* shall be allowed against the defendant."

A default admits the facts averred in the petition to be true, but does not admit that such facts constitute a cause of action.⁵

576; *People v. Hyde Park*, 117 Ill. 462; *Chicago v. Sansum*, 87 Ill. 182; *Macoupin Co. v. People*, 58 Ill. 191; *Com. v. Jackson*, 61 Ill. App. 381.

¹ Tap. on *Mandamus*, 282.

² *People v. Town of Mt. Morris*, 145 Ill. 427; *People v. Supervisors*, 125 Ill. 334; *North v. Board of Trade*, 137 Ill. 296; *Swigert v. Hamilton Co.*, 130 Ill. 538; *People v. Hatch*, 33 Ill. 9; *McCagg v. Mayor*, 51 Ill. 17; *Allen v. Conlon*, 2 Bradw. 166; *People v. City Council*, 66 Ill. 507; *Supervisors v. People*, 12 Bradw. 210; *People v. Glann*, 70 Ill. 232; *Moses*

on Mand. 204, 205; *Stark Co. v. People*, 110 Ill. 577; *Klokke v. Stanley*, 109 Ill. 192; *People v. Trustees*, 111 Ill. 171; *Lavalley v. Soucy*, 96 Ill. 469; *People v. Hyde Park*, 117 Ill. 462; *People v. Davis*, 39 Ill. App. 162; *People v. Village*, 48 Ill. App. 643; *People v. Soucy*, 26 Ill. App. 505; *People v. Ruby*, 59 Ill. App. 653.

³ *North v. Board of Trade*, 137 Ill. 298.

⁴ *People v. Pavey*, 151 Ill. 101.

⁵ *Madison Co. v. Smith*, 95 Ill. 328.

Time to plead.—Sec. 3 provides that “The court in which any such petition is filed may allow the petitioner or any defendant such convenient time to answer, plead, reply, rejoin or demur as shall be deemed just and equitable.”

False return.—Sec. 6 provides that “If damages are recovered against the defendant, he shall not be liable to be sued in any other action or suit, as for making a false return.”

Judgment.—Sec. 5 provides that “If a verdict is found for the petitioner, or judgment is given for him upon demurrer, *nil dicit*, or for want of an answer or other pleading, he shall recover his damages and costs, and a peremptory writ of *mandamus* shall be granted. If judgment is given for defendant he shall recover his costs.”

A personal judgment against a public officer, in a proceeding by *mandamus*, to compel the payment of money, is erroneous.¹

Where a petition for a writ of *mandamus* asks the court to compel the performance of two different acts, it may be issued for a part of the relief sought and denied in part.²

New defendants.—Sec. 7 provides that “If, after the filing of any such petition, any other person than the original defendant shall appear to the court to have or claim any right or interest in the subject-matter, such person may be made a defendant, and may be summoned, and appear and plead, answer and demur, in the same manner as if he had been made defendant to the original petition.” This section does not give to any person who has or claims an interest in the subject-matter, the right to interplead and ask affirmative relief.³

Death of defendant.—Sec. 8 provides that “The death, resignation or removal from office, by lapse of time or otherwise, of any defendant, shall not have the effect to abate the suit, but his successor may be made a party thereto, and any peremptory writ may be directed against him.”⁴

Effect of other remedy.—Sec. 9 provides that “The proceedings for a writ of *mandamus* shall not be dismissed, nor

¹ *Rogers v. People*, 68 Ill. 154.

Ill. 90; *People v. Lippincott*, 72 Ill.

² *Watch Co. v. Pearson*, 140 Ill.

578.

423; *People v. Secretary of State*, 58

³ *Winstanley v. People*, 92 Ill. 402.

⁴ See 17 Wall. (U. S.) 604.

the writ denied, because the petitioner may have another specific legal remedy where such writ will afford a proper and sufficient remedy; and amendments may be allowed as in other civil suits."

Prior to the present statute *mandamus* would not lie where there was another adequate remedy at law,¹ but under the statute as amended it is otherwise.²

The petition may be amended to cure variance,³ and so with the alternative writ.⁴

Where a demurrer is sustained to the answer because some of the issues tendered are immaterial, leave should be given to amend.⁵

Sec. 10 provides that "appeals and writs of error may be taken and prosecuted in the same manner, upon the same terms and with like effect as in other civil cases."⁶

No. 302. Petition for a mandamus.

To the Circuit Court of the County of —, in the State of Illinois.

The petitioner, A. B., of, etc., complaining, shows that at the general election held in and for the said county of —, on the Tuesday next after the first Monday of November, in the year 18—, he was a candidate for the office of sheriff of the said county, and received the highest number of votes for that office, and was duly elected thereto; and that thereupon the county clerk of the county aforesaid, on, etc., made out and delivered to the petitioner a certificate of his election to the said office of sheriff, as aforesaid; a true copy of which said certificate, marked Exhibit A, is annexed to and made a part of this petition. And the petitioner further shows, that within seven days after the said election, the said county clerk, with the assistance of two justices of the peace of the said county, made out an abstract of the votes cast for county officers at the said election; and that thereupon the said county clerk, on, etc., enveloped and sealed up a copy of the said abstract, and transmitted the same to the secretary of state for the said State of Illinois, who afterwards, on or about the — day of, etc., duly received the same. And the petitioner further shows that on or about the day last aforesaid, the governor of the said state, by his commis-

¹ *Highway Comm. v. People*, 73 Ill. 203.

² *People v. Crotty*, 93 Ill. 180; *Lower v. U. S.*, 91 U. S. 536; *E. St. Louis v. Millard*, 14 Bradw. 483; *Brokaw v. Comm.*, 130 Ill. 482; *Ry. Co. v. People*, 121 Ill. 483; *Tow Co. v. Thomas*, 60 Ill. App. 234.

³ *E. St. Louis v. Underwood*, 105 Ill. 308.

⁴ *Com. Highways v. People*, 38 Ill. 347.

⁵ *Sup. Kendall Co. v. People*, 12 Ill. App. 210.

⁶ See *Swift v. People*, 160 Ill. 561.

sion under the seal of the said state, duly commissioned the petitioner as sheriff of the county aforesaid, to continue in office for the term of two years; which said commission was thereupon transmitted by the said secretary of state to the clerk of the said county court of the county aforesaid, and was, on or about the — day of, etc., received by C. D., who then was, and from thence hitherto has been, and still is, clerk of the said court; and that thereupon the said C. D., as such clerk, on the same day gave notice to the petitioner of the receipt of his said commission. And the petitioner further shows, that within thirty days after receiving the said notice, to wit, on, etc., he entered into a bond, bearing date of that day, with the People of the said State of Illinois, with good and sufficient security, in the penal sum of ten thousand dollars, conditioned for the faithful discharge of all the duties required or to be required of him by law, as such sheriff; and that at the term of the said county court next after the date of the said bond, and within thirty days after the petitioner received notice of his said commission, as aforesaid, to wit, on, etc., the said bond was [in the said court] duly approved by the Honorable L. M., then judge of the said court; [as by the record of the said approval, remaining in the said court, more fully appears]; a true copy of which said bond [and of the said approval thereof by the said judge, thereon written], is hereto annexed, marked Exhibit B, and made a part of this petition.

And the petitioner further shows, that afterwards, on the same day, but after the adjournment of that term of the said court, he tendered to the said C. D., so being such clerk as aforesaid, at his office in —, in the county aforesaid, the bond above mentioned, [with the said approval thereon written,] and offered to take and subscribe before him the oath of office required by law of sheriffs, and then and there requested the said C. D., as such clerk, to receive the said bond, and to administer to the petitioner the said oath of office, and to file and record the said oath and bond, and to certify the taking and subscribing of the said oath on the back of the said commission, and to deliver the said commission to the petitioner: Yet the said C. D., so being such clerk as aforesaid, then and there wholly refused, and still refuses, to receive the said bond, or to administer to the petitioner the said oath of office, or to file and record the said oath and bond, or to certify the taking and subscribing of the said oath on the back of the said commission, or to deliver the said commission to the petitioner: By means whereof, the petitioner is prevented from entering upon and exercising the duties of the said office of sheriff, and is kept out of the said office, to which he is justly and lawfully entitled. Wherefore the petitioner prays a writ of *mandamus*, directed to the said C. D., commanding him forthwith to receive the said bond, and to administer to the petitioner the said oath of office, and to file and record the said oath and bond, and to certify the taking and subscribing of the said oath on the back of the said commission, and to deliver the said commission to the petitioner; and that such further order may be made in the premises as justice may require, etc.¹

A. B.

¹ *People v. Fletcher*, 2 Scam. 482.

STATE OF ILLINOIS, }
 County of —. } sct. A. B., the petitioner in the foregoing petition
 named, makes oath and says, that the several matters and things in the
 said petition contained are true, to the best of his knowledge, information
 and belief.¹

A. B.

Subscribed and sworn, etc.¹

See the substance of a petition for a *mandamus* to compel a municipal corporation to pay the amount of a judgment obtained against it, 50 Ill. 160; the substance of a petition for a *mandamus* to compel a county clerk to make out and deliver a certificate of election, 29 Ill. 413; a petition for a writ to compel a municipal corporation to complete the collection of a certain tax specially assessed, for the opening of a street, and to pay the damages awarded to the petitioner, 18 Ill. 276; to compel a county judge (under a special statute) to ascertain, with the mayor of a city, the proportion of taxes to be paid to the city, 25 Ill. 187; to compel the auditor to allow damages on protested bank bills, out of the proceeds of stocks sold on the winding up of a bank, 29 Ill. 48; to compel the judges of a court to receive the appearance of a defendant in an action, with or without entering of special bail, *Moses on Mandamus*, 237; to compel a city council to pass an order on the treasurer, *Id.* 239.

DEFENSES.

The Illinois practice act, as above mentioned, provides that the issues in "an action of *mandamus*," shall be made up "by answering, pleading or demurring to the petition, as in other cases."²

For demurrers, see *Defenses to an Action*, *ante*, page 60.

Pleadings.—Section 4 provides that "The petitioner may plead to or traverse all or any of the material facts contained in the answer, or demur thereto, to which the defendant shall reply, take issue or demur, and like proceeding shall be had as in other cases at law."

Under our statute, a *mandamus* proceeding is an action at

¹ *Moses Mand.* 238, 241; *Ex parte Taylor*, 14 How. (U. S.) 3; *People v. Chicago*, 25 Ill. 483.

² *Starr & Curtis* 1587; *Rev. Stat.* (1893) 957; *Rev. Stat.* (1895) 1020.

law, and it is therefore governed by the same rules of pleading that are applicable to other actions at law.¹ Under the former practice, in proceedings for *mandamus*, the defendant's return to the alternative writ, corresponded to the answer to the petition under the present practice. Under the present statute, the petition takes the place of the alternative writ, and the defects therein are taken advantage of in the same manner as defects in the alternative writ were formerly reached.²

Substantial defects in a petition may be taken advantage of at any time before granting the peremptory writ. Where, under the former practice, the return to the alternative writ controverted no facts alleged in the writ, the return was held to have the effect of a demurrer only.³

The answer of pleas must either deny the facts alleged in the petition, on which the claim of the relator is founded, or must set up other facts sufficient in law to defeat such claim, and these facts should be alleged positively and distinctly;⁴ and if instead of stating facts, the pleading merely sets out and refers to matters of evidence from which these facts are inferred, it is objectionable.⁵

All the material facts alleged in the petition, not denied by the pleadings of the respondent, will be taken as true;⁶ and every intendment will be made against an answer or plea which is not responsive to the important allegations of fact contained in the petition.⁷

It is not sufficient to aver conclusions of law.⁸ If an answer

¹ *Dement v. Rokker*, 126 Ill. 174; *Super. v. People*, 159 Ill. 242; *Swift v. People*, 160 Ill. 561.

² *People v. Crabb*, 156 Ill. 155.

³ *People v. Mt. Morris*, 145 Ill. 427.

⁴ *R. R. Co. v. Suffern*, 129 Ill. 274; *People v. Horton*, 46 Ill. App. 434; *Bank v. Canal Com.*, 10 Wend. 20; *People v. Baker*, 35 Barb. 105; *People v. Crabb*, 156 Ill. 155; *Board v. Nelson*, 62 Ill. App. 541.

⁵ *Moses on Mandamus* 210; *Bank v. Canal Com.*, 10 Wend. 20; *People*

v. Baker, 35 Barb. 105; *Commonwealth v. Commissioners*, 37 Penn. St. 237.

⁶ *R. R. Co. v. Suffern*, 129 Ill. 274; *Supervisors Madison Co. v. Smith* 95 Ill. 328; *People v. Crabb*, 156 Ill. 155.

⁷ *People v. Kilduff*, 15 Ill. 492; *People v. Supervisors*, 51 Ill. 191; *People v. Horton*, 46 Ill. App. 434; *Board v. Nelson*, 62 Ill. App. 541.

⁸ *People v. Supervisors*, 51 Ill. 191.

or plea is insufficient, the relator may demur;¹ but a demurrer admits the truth of the matters set forth in the answer or plea.²

And when the answer shows the non-joinder of necessary parties plaintiff, a general demurrer thereto will be an admission of that fact.³

Where there is no issue of fact made by the pleadings, upon which the determination of the right of the relator to the peremptory writ depends, the answer will be treated as a demurrer to the petition, and the right to the writ will depend upon the sufficiency of the petition on its face.⁴

On demurrer to a petition for a *mandamus* by a part of the respondents, the question as to the sufficiency of the service upon one not appearing can not arise. The only question presented is the sufficiency of the petition.⁵ If the respondent answers to the merits after his demurrer to the form of the petition is overruled, he will thereby waive his grounds of demurrer, and can not urge the same objection to the petition after trial on the merits.⁶

A petition for *mandamus* is subject to be barred by statute of limitations.⁷

No. 303. *Answer to a petition for a mandamus.*

In the — Circuit Court.

— Term, 18—.

The answer of C. D., defendant, to the petition of A. B., petitioner, for a writ of *mandamus*.

The defendant, for answer to the said petition, says, that (*here deny, or confess and avoid, or admit, some material allegation of the petition.*)

And the defendant further answering, says, that (*here deny, or confess and avoid, or admit, some other material allegation of the petition; and proceed in this manner until the whole petition is answered.*)

Wherefore the defendant prays the judgment of the court here, whether the petitioner ought to have a writ of *mandamus* in this behalf; and that he, the defendant, may be hence dismissed, with his costs, etc.

C. D.

¹ Moses on Mand. 214.

² *People v. Supervisors*, 47 Ill. 256; *Dement v. Rokker*, 126 Ill. 174.

³ *Dement v. Rokker*, 126 Ill. 174.

⁴ *People v. Mt. Morris*, 145 Ill. 427.

⁵ *People v. Town of Mt. Morris*, 137 Ill. 576.

⁶ *I. C. R. R. Co. v. People*, 143 Ill. 434.

⁷ *Super. v. Gordon*, 82 Ill. 435; *Meents v. Monroe*, 62 Ill. App. 17.

No. 304. *Plea to a petition for a mandamus.*

In the — Circuit Court.

— Term, 18—.

C. D. <i>ats.</i> The People, etc., <i>ex rel.</i> A. B.	}	Proceeding for <i>mandamus</i>. And the defendant, by E. F., his attorney, comes and defends, etc., and says that the peti- tioner ought not to have a writ of <i>mandamus</i> agaist him, the defendant, in this behalf, because he says, that (<i>here set forth the subject-matter of the</i> <i>defense. If the plea merely denies an allegation of the petition, conclude</i> <i>to the country. If it sets up new matter, conclude—</i>“And this the defend- ant is ready to verify; wherefore he prays judgment if the petitioner ought to have a writ of <i>mandamus</i> against him in this behalf, etc.”)
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If the defendant desires to deny more than one material averment of the petition, or to set up several defenses, he should plead as many distinct pleas as there are matters of fact to be traversed, or defenses to be presented.

CHAPTER XVII.

CERTIORARI.

Certiorari is the name of a judicial writ issued by a superior court, directed to one of an inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case.¹

I. THE COMMON LAW WRIT.

The general rule seems to be, that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative. But it is not essential that the proceedings shall be strictly and technically "judicial," in the sense in which that word is used when applied to courts of justice. It is sufficient if they are *quasi* judicial.²

A body, municipal or otherwise, to which power has been intrusted, does not exercise judicial action merely because it is vested with discretion, or may exercise judgment.³

The common law remedy of *certiorari* is adopted and in force in this state, and any court exercising general common law jurisdiction has, unless expressly forbidden to do so by the statute, an inherent authority to issue the writ.⁴

It is not a writ of right, but issues only under proper application and proper cause shown,⁵ and only when a court, upon

¹ *Deer v. Comm.*, 109 Ill. 379; *Ennis v. Ennis*, 110 Ill. 78; *Comm. v. Supervisors*, 27 Ill. 140; *Peterson v. Lawrence*, 20 Bradw. 631; *Hamilton v. Harwood*, 113 Ill. 154; *Hyslop v. Finch*, 99 Ill. 171; *Randolph v. Co. Board*, 19 Bradw. 100.

² *Com. v. Griffin*, 134 Ill. 330; *Whittaker v. Village*, 150 Ill. 195;

Brown v. Robertson, 123 Ill. 631; *Mayor v. Dean*, 62 Ill. App. 41.

³ *Mayor v. Dean*, 62 Ill. App., and cases there cited.

⁴ *Com. v. Griffin*, 134 Ill. 330.

⁵ *Com. v. Griffin*, 134 Ill. 330; *Chapman v. Com.*, 28 Ill. App. 17; *Lees v. Drain. Com.*, 24 Ill. App. 488.

investigation, and in the exercise of sound legal discretion, can see that justice requires it.¹

The only office which the common law writ of *certiorari* performs, is to cause the record of a proceeding to be certified from an inferior to a superior tribunal. Upon service of the writ it becomes the duty of the inferior tribunal, to which it is directed, to transmit a full and complete transcript of the record of the proceeding, of which complaint is made, to the court awarding the writ. Nothing outside of the record should be certified, but simply the record itself. Upon the return of the writ, the cause is tried solely upon the record; and allegations in the petition, of matters outside of the record, will not be considered. No trial can be had upon any issue of fact. When the return is sufficient, the court will determine, upon the record alone, whether the inferior tribunal had jurisdiction of the parties and of the subject-matter, and whether it had exceeded its jurisdiction, or otherwise proceeded in violation of law.²

When the controversy involves the investigation of facts not appearing in the record, *certiorari* is not the proper remedy.³

If the want of jurisdiction appears from the record, the proper judgment is that the record be quashed.⁴

The writ will not lie merely because proceedings have been commenced before a tribunal that has no jurisdiction, when the tribunal has not taken final action on them, and has made no order which must, of itself, injuriously affect the party suing out the writ, unless it shall be annulled by a court of review.⁵

The common law proceeding is wholly different from that

¹ *Board Sup. v. Magoon*, 109 Ill. 142; *Trustees v. Sch. Dir.*, 88 Ill. 100; *People v. Trustees*, 42 Ill. App. 650.

² *Com. v. Supervisors*, 27 Ill. 140; *Com. v. Harper*, 38 Ill. 104; *Ry. Co. v. Fell*, 22 Ill. 333; *Donahue v. County*, 100 Ill. 94; *Peterson v. Lawrence*, 20 Bradw. 631; *Gerdes v. Champion*, 108 Ill. 137; *Deer v.*

Com., 109 Ill. 379; *McManus v. McDonough*, 107 Ill. 95; *Com. v. Griffin*, 134 Ill. 330; *Blair v. Sennott*, 134 Ill. 78.

³ *Smith v. Com.* 150 Ill. 385; *Randecker v. Com.*, 61 Ill. App. 426.

⁴ *Smith v. Com.*, 150 Ill. 385; *Com. v. Griffin*, 134 Ill. 330.

⁵ *Glennon v. Burton*, 144 Ill. 551.

under the statutory writ of *certiorari* (in Illinois), as in the latter there is a trial *de novo*.¹

The common law writ of *certiorari* may issue to all inferior tribunals, in cases where they have exceeded their jurisdiction, and in cases where they have proceeded illegally, and there is no appeal, or other mode of directly reviewing their proceedings. These are the only instances in which the proceedings of such inferior tribunals can be reviewed on *certiorari*.²

In case a court refuses to make a record of its proceedings, the remedy is not by *certiorari*, but by *mandamus*.³

A writ of *certiorari* at common law to review the record of a justice of the peace for illegality in the proceeding, does not lie until the justice has rendered a final judgment. The writ can not be made to operate as an injunction and restrain a tribunal from acting beyond its jurisdiction.⁴

Mere lapse of time alone, short of the limitation for the prosecution of a writ of error, will not bar the issuing of a common law *certiorari*.⁵

To be barred by *laches*, it must appear that since the making of the record, sought to be reviewed, and upon its assumed validity, something has been done so that great public detriment or inconvenience might result from declaring it invalid.⁶

The writ is obeyed by returning and certifying the record of the proceedings of the inferior tribunal, or the entries made by it in the nature of a record. A common law *certiorari* removes nothing more; and if the return contains anything more

¹ *Gallimore v. Dazey*, 12 Ill. 142; *Comm. v. Supervisors*, 27 Ill. 140.

² *R. R. Co. v. Whipple*, 22 Ill. 108; *Doolittle v. R. R. Co.*, 14 Ill. 381; *People v. Wilkinson*, 13 Ill. 660; *City of Ottawa v. R. R. Co.*, 25 Ill. 43; *Rue v. Chicago*, 66 Ill. 256; *Milner v. Trustees*, 88 Ill. 26; *Supervisors v. Magoon*, 109 Ill. 142; *Hamilton v. Harwood*, 113 Ill. 154; *Drain. Com. v. Griffin*, 134 Ill. 330; *Smith v. Com.*, 150 Ill. 385; *Wright v. Com.*, 150 Ill.

138; *Glennon v. Burton*, 144 Ill. 551; *Trustees v. Shepherd*, 139 Ill. 114; *Schlink v. Maxton*, 153 Ill. 447; *Lees v. Dr. Com.* 125 Ill. 47; *People v. Newberry*, 135 Ill. 471; *Mayor v. Dean*, 62 Ill. App. 41.

³ *Blair v. Sennott*, 134 Ill. 78.

⁴ *Glennon v. Burton*, 144 Ill. 551.

⁵ *Hyslop v. Finch*, 99 Ill. 175.

⁶ *Dr. Com. v. Volke*, 59 Ill. App. 286; see *Trustees v. Sch. Dir.*, 88 Ill. 100.

it will be rejected or disregarded *pro tanto*.¹ The writ can not, in general, bring up for review the evidence, and the rulings and decisions of the inferior tribunal thereon, but only the record. When there is technically no record, the written proceedings and orders, or a history of the proceedings and the written orders, which are in the nature of records, are to be certified.²

If the writ has issued in an improper case, the defendant may move to quash it; and the court will quash it even after a return, and a hearing on the merits.³

See a petition for a common law *certiorari*, 20 Ill. R. 537.

This writ is sometimes used as an auxiliary process to obtain a full return to some other process. For example, when the record of an inferior court is taken before a superior court by appeal, writ of error, or otherwise, and a suggestion of a diminution, etc., is made, a *certiorari* will be granted, requiring a true record to be sent up.⁴ It is the proper remedy to review the proceedings of commissioners of highways in establishing a road.⁵

II. THE STATUTORY WRIT.

The statute of Illinois provides as follows:

“The judges of the courts to which appeals may be taken, shall have power, within their respective jurisdiction, and it shall be their duty, upon petition made as hereinafter mentioned, to grant writs of *certiorari*, to remove causes from before justices of the peace into their courts, who shall indorse an order for the same upon the petition of the party praying such writ; and on producing the same to the clerk of the court he shall issue said writ in conformity to the provisions of this act.

¹Green's Pr. 497; *McManus v. McDonough*, 107 Ill. 95.

²*Stone v. Mayor*, 25 Wend. 168; see *Miller v. Trustees*, 88 Ill. 26; *Trustees v. Directors*, 88 Ill. 100; *Savage v. Com'rs*, 10 Bradw. 204.

³1 How. Pr. 141; *Ennis v. Ennis*, 110 Ill. 78.

⁴*Holmes v. Parker*, 1 Scam. 567;

James v. Hughitt, 2 Scam. 361; *Boynton v. Champlin*, 40 Ill. 63; see *Ennis v. Ennis*, 110 Ill. 78; *Scates v. Ry. Co.*, 104 Ill. 93.

⁵*Trainer v. Lawrence*, 36 Ill. App. 90; *Com. v. Newby*, 31 Ill. App. 378; *Ravette v. Race*, 152 Ill. 672; *Com. v. Hoblit*, 19 Ill. App. 259; *Brown v. Roberts*, 23 Ill. App. 461.

"The petition for a writ of *certiorari* shall set forth and show, upon the oath of the applicant, or his agent, that the judgment before the justice of the peace was not the result of negligence in the party praying such writ; that the judgment, in his opinion, is unjust and erroneous, setting forth wherein the injustice and error consists, and that it was not in the power of the party to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing.

"No writ of *certiorari* shall issue after the expiration of six months from the time of the rendition of judgment.¹

"Before any writ of *certiorari* shall issue, the party applying therefor shall give bond, with security, in the same manner and with the same conditions, and when the same shall be defective, may be perfected as bonds in cases of appeals from justices of the peace. The writ of *certiorari* shall require the justice to certify to the court issuing the writ a transcript of the judgment and other proceedings had before him; and in no case shall the justice be required to send up a minute or memorandum of the evidence given before him; but upon the return of said writ, such proceedings shall be had thereon as in cases of appeals."²

The statute also provides that one or more of several plaintiffs or defendants may sue out a *certiorari* without the consent of the others; and all further proceedings are thereupon to be stayed, the same as if all had united in such *certiorari*.³

A writ of *certiorari* is also given in cases of the trial of the right of property before justices of the peace.⁴ Masters in chancery, in their respective counties, may order the issuing of

¹ *Graff v. Smolensky*, 35 Ill. App. 264.

² 2 Starr & Curtis, 1461-2; Rev. Stat. (1895) 974; *Yunt v. Brown*, 1 Scam. 264; *Cushman v. Rice*, 1 Scam. 565; *Lord v. Burke*, 4 Gilm. 363; *Hoare v. Harris*, 14 Ill. 35; *Murray v. Murphy*, 16 Ill. 275; *Clifford v. Waldrop*, 23 Ill. 336; *Harri-son v. Chipp*, 25 Ill. 575; *Davis v.*

Randall, 26 Ill. 243; *Otten v. Lehr*, 68 Ill. 64; *Darmstadter v. Armour*, 17 Bradw. 285; *Hough v. Baldwin*, 16 Ill. 294; *Russell v. Pickering*, 17 Ill. 31.

³ 2 Starr & Curtis, 1454; Rev. Stat. (1895) 966; see *Flinn v. Barlow*, 16 Ill. 39.

⁴ 2 Starr & Curtis, 1469; Rev. Stat. (1895) 969.

writs of *certiorari*, to remove causes from before justices of the peace into the proper court.

Requisites of petition, etc.—A petition for a writ of *certiorari* must clearly point out wherein the injustice of the judgment complained of consists. Allegations of injustice, made in general terms, will not suffice. It must state facts sufficient to show that injustice has been done.¹

The statute requires that the petition “shall set forth and show that the judgment before the justice of the peace was not the result of negligence.” This requirement can only be fulfilled by setting forth facts which show that the party was not guilty of negligence in not attending to the defense of the cause before the justice.² The mere statement that the judgment was not the result of the negligence of the petitioner, does not show that such was the case; that is a conclusion for the court to draw from the facts alleged.³

Where a party permits a judgment to go by default, before a justice of the peace, with the intention of taking an appeal to the circuit court, and contesting the merits in that court, a petition for *certiorari* will not be sustained. Diligence must be used to prevent the judgment in the justice’s court.⁴

It is not sufficient to aver that the justice, in receiving or rejecting testimony, or in any matter arising upon the trial, erred in point of law, if the petitioner is not injured by the final determination, in the amount of the judgment recovered.⁵

Where a petition is based on the ground that the petitioner did not know of the rendering of a judgment against him until the twenty days in which the appeal might have been taken had elapsed, by reason of his being misled by the opposite party, he should state how and by what he was misled;

¹ *Harrison v. Chipp*, 25 Ill. 575; *Davis v. Randall*, 26 Ill. 243; *Murray v. Murphy*, 16 Ill. 275; *Bank v. Beresford*, 78 Ill. 392; *Cole v. Atkinson*, 6 Bradw. 353; *C. B. Co. v. Brewer*, 57 Ill. App. 526.

² *Stocking v. Knight*, 19 Ill. App. 501; *R. R. Co. v. McCoy*, 23 Ill. App. 143.

³ *Clifford v. Waldrup*, 23 Ill. 336; *Russell v. Pickering*, 17 Ill. 31; *Harrison v. Chipp*, 25 Ill. 575; *Doan v. Sibbitt*, 61 Ill. 485; *Trustees v. Kemper*, 88 Ill. 579.

⁴ *Murray v. Murphy*, 16 Ill. 275; *O’Hara v. O’Brien*, 4 Bradw. 154.

⁵ *Hough v. Baldwin*, 16 Ill. 293; *Trustees v. Kemper*, 88 Ill. 579.

and he should show diligence, by an inspection of the justices' docket or otherwise, to ascertain what order had been made in the suit, or some reason why this was not done.¹

The petition must also allege that it was not in the power of the party to take an appeal in the ordinary way, and must set forth particularly the circumstances that prevented him from so doing.²

Where a petition alleged that the petitioner was a poor man, and that it took him several days after the rendition of judgment to procure security on the appeal bond; that fourteen or fifteen days after the rendition of judgment he called at the justice's office for the purpose of procuring the proper papers and perfecting his appeal, but the justice was absent from his office, and the petitioner, after diligent inquiry, was unable to learn where he was; that on the last day when he could have taken the appeal, he again called at the justice's office, and again failed to find him, making the same inquiry as at the first time; it was decided that sufficient diligence was not shown. No reason appeared why the petitioner did not enter his appeal with the clerk of the court.³

Where a petition states that the petitioner had been summoned as garnishee in a number of cases, before the same justice of the peace, and was discharged after examination, by the justice, and had no knowledge that a judgment was rendered against him, until it was too late to take an appeal, and that the judgment was unjust, showing wherein, he can have relief by writ of *certiorari*.⁴

Where a petition of a guardian for a writ of *certiorari* stated that he was taken sick shortly after the service of process upon him, and continued unable to transact business until

¹ *Davis v. Randall*, 26 Ill. 243; see *Fitzgerald v. Kimball*, 86 Ill. 396; *Bank v. Beresford*, 78 Ill. 391; *O'Hara v. O'Brien*, 4 Bradw. 154; see *McDonald v. Williams*, 41 Ill. App. 378.

² *Holmes v. Parker*, 1 Scam. 567; see *Lord v. Burke*, 4 Gilm. 363; *Davis v. Randall*, 26 Ill. 243; *Harrison v. Chipp*, 25 Ill. 575; *Hoare v.*

Harris, 14 Ill. 35; *Dye v. Noel*, 85 Ill. 290; *Darmstadter v. Armour*, 17 Bradw. 285; *Reilly v. Prince*, 37 Ill. App. 102.

³ *White v. Frye*, 2 Gilm. 65; *Darmstadter v. Armour*, 17 Bradw. 285.

⁴ *McNerney v. Newberry*, 37 Ill. 91; *Pierce v. Wade*, 19 Bradw. 185.

after the trial; that as soon as he was able to attend to business, and within twenty days after judgment, he demanded an appeal, which was refused on the ground that it should have been taken on the day of trial; and that the judgment was not upon a valid claim against the estate; it was held that the petition entitled the guardian to the writ.¹

A petition for a *certiorari*, to bring up the proceedings had before a justice of the peace, must stand on its merits; affidavits in support of it, or against it, can not be read.² The court will take into consideration the condition of a party, where he shows in his petition circumstances that prevented his using diligence; as that he was a physician, and was necessarily attending upon patients dangerously ill, etc.; or that he was sick at the time the judgment was rendered against him, and unable to attend the trial, etc.³

Where a statute gives an appeal from an assessment of damages for a right of way, a *certiorari* will be sustained, it appearing that the petitioner had no notice of the assessment, or opportunity to appeal. A *certiorari* in such a case is in the nature of an appeal from the decision of a justice of the peace, and governed by the same rules.⁴ A judgment entered by a justice of the peace, which is based upon an admission by the defendant of the amount due, is not entered by confession, and a writ of *certiorari* lies to remove the cause in which such judgment is entered to the circuit court.⁵ No question of *laches* is involved upon the issuance of a writ of *certiorari* at any time during the period prescribed by the statute.⁶

No. 305. Petition for a certiorari to a justice of the peace.

To the Honorable L. M., Judge of the — court of the county of —, in the State of Illinois.

Your petitioner, A. B., of, etc., complaining shows, that C. D., of, etc.,

¹ *Hoare v. Harris*, 14 Ill. 35; *Otten v. Lehr*, 68 Ill. 64.

² *Davis v. Randall*, 26 Ill. 243; *Harrison v. Chipp*, 25 Ill. 575; *Fitzgerald v. Kimball*, 86 Ill. 396.

³ *Cook v. Hoyt*, 13 Ill. 144; *Hoare v. Harris*, 14 Ill. 35; *White v. Frye*, 2 Gilm. 65.

⁴ *R. R. Co. v. Barrows*, 24 Ill. 562; *Shinkle v. Magill*, 58 Ill. 422; *Hyslop v. Finch*, 99 Ill. 171.

⁵ *Goddard v. Fisher*, 23 Ill. App. 365.

⁶ *Graff v. Smolensky*, 35 Ill. App. 264.

on the — day of, etc., commenced an action against your petitioner, before one G. H., then and still being one of the justices of the peace in and for the said county of —, to recover the sum of — dollars, alleged to be due from your petitioner to the said C. D., for (*here the subject-matter of the alleged debt may be stated*); and that afterwards, on, etc., the said justice rendered judgment against your petitioner, in that action, for the sum of — dollars, and costs of suit; which matters aforesaid appear to your petitioner from the docket of the said justice, and the papers in that behalf filed and remaining in his office. And your petitioner further shows that at the time of the commencement of the said action, and from thence continually until more than twenty days had elapsed after the rendition of the said judgment as aforesaid, your petitioner was absent from this state; and that during all that time your petitioner had no knowledge or information of the commencement or pendency of the said action, or of the rendition of the said judgment, as aforesaid; and that therefore your petitioner could not take an appeal from the said judgment in the ordinary way. And your petitioner further shows that he was not at the time of the commencement of the said action as aforesaid, nor is now, in any manner indebted to the said C. D.; and that the said judgment is therefore wholly unjust and erroneous. Your petitioner therefore prays a writ of *certiorari*, to remove the said cause from before the said justice into the said — court, according to the form of the statute in such case made and provided.

A. B.

STATE OF ILLINOIS, }

County of —. } sct. A. B., the petitioner in the foregoing petition named, makes oath and says that the matters and things in the said petition contained are true in substance and in fact.

A. B.

Subscribed and sworn, etc.

If made by an agent, the affidavit may be as follows :

“J. K. makes oath and says that he is the agent in this behalf of A. B., the petitioner in the foregoing petition named; and that the matters and things in the said petition contained are true, to the best of this affiant's knowledge, information and belief.”

See a petition for a *certiorari* by a garnishee, 37 Ill. R. 91.

The statute of Illinois provides that “the justice of the peace, constables, and other persons concerned, shall, as soon as the writ of *certiorari* shall be served on such officers, stay all further proceedings in that case until the further order of the court issuing the writ.”¹

Where a cause is taken up by *certiorari*, the trial is to be *de novo*, as in cases of appeal.² The justice is not required

¹ Starr & Curtis 1462; Rev. Stat. (1893) 911; Rev. Stat. (1895) 966; *Comm. v. People*, 99 Ill. 587.

² *Gallimore v. Dazey*, 12 Ill. 143; *Gerdes v. Champion*, 108 Ill. 137; *Deer v. Comm.*, 109 Ill. 379.

to make any formal return to the writ; his only duty is to send up the papers and proceedings; and if the writ is served and returned, and its mandate is not obeyed, an attachment may issue against the justice.¹ Where the papers and a transcript of the proceedings are filed in the court, the issuing of a *certiorari* to the justice is unnecessary.²

The dismissal of an appeal, or a *certiorari*, is equivalent to an affirmance of the judgment, so as to entitle the party to claim a forfeiture of the bond, and to have his action thereon.³

By the statute, if the judgment of the justice is reversed, in whole or in part, such reversal does not vitiate any sale on execution, effected before the issuing of the *certiorari*; but in such cases the court may assess the damages which have accrued in consequence of such sale, and "cause judgment to be entered or a deduction made therefor." In case of a partial reversal of the judgment, the costs may be apportioned.⁴

¹ *Gallimore v. Dazey*, 12 Ill. 143;
McManus v. McDonough, 4 Bradw.
180.

² *Stout v. Slattery*, 12 Ill. 162;
Gallimore v. Dazey, 12 Ill. 143.

³ *McConnell v. Parsons*, 2 Scam.

571; *Doan v. Sibbitt*, 61 Ill. 485;
Faas v. O'Connor, 6 Bradw. 593.

⁴ 2 Starr & Curtis 1463; Rev. Stat.
(1893) 911; Rev. Stat. (1895) 974;
Wickersham v. Hurd, 72 Ill. 464;
Beckman v. Kreamer, 43 Ill. 447.

CHAPTER XVIII.

QUO WARRANTO.

Quo warranto is the name of a writ issued in the name of the people or government, against any person or corporation that usurps any franchise or office, commanding the sheriff of the county to summon the defendant to be and appear before the court from whence the writ issued, at a time and place therein named, to show "by what warrant" he claims the franchise or office mentioned in the writ.¹

By the fiction of the feudal law, the king, as the head and visible representative of the community, was considered not only as the ultimate proprietor of all the land in the kingdom, but the fountain from whence all public franchises were derived; and if any individual or collective body of men, whether corporate or not, without legal authority, exercised any such franchise, it was considered as an usurpation of the king's prerogative; and if a franchise had been legally granted, but was exercised in a manner inconsistent with the express or implied condition of the grant, the franchise was considered forfeited, and the sovereign might resume it. This writ has become obsolete, having given way to informations in the nature of a *quo warranto* at the common law.²

Nature of.—An information in the nature of a *quo warranto* is understood to be in form a criminal proceeding,³ and can be resorted to only in cases where the public, in theory at least, has some interest.⁴ It does not lie merely as to private

¹ 2 Bla. Com. 262, 263; 2 Bouv. L. D. 417; *Wallace v. Anderson*, 5 Wheat. 291; *Commonwealth v. Dearborn*, 15 Mass. 125; Ang. & Ames on Corp., Sec. 731.

² Ang. & Ames on Corp., Sec. 721; 2 Bouv. L. D. 417; see 3 Bla. Com. 262, 263.

³ *Donnelly v. People*, 11 Ill. 552

People v. Shaw, 13 Ill. 581; *Wight v. People*, 15 Ill. 417; *People v. Ridgley*, 21 Ill. 65; *Cheshshire v. People*, 116 Ill. 493.

⁴ *Dickson v. People*, 17 Ill. 191; *People v. Ridgley*, 21 Ill. 65; *People v. Golden Rule*, 114 Ill. 34; *McGrath v. People*, 100 Ill. 464; see *People v. Boyd*, 132 Ill. 60.

rights.¹ Though a criminal proceeding in form, yet in substance it is but a civil one.² And is so regarded in this state.³

Jurisdiction of circuit courts.—By the constitution (sec. 12, art. 6), the circuit courts are vested with the power, among others, to hear and determine informations in the nature of *quo warranto*, they being proceedings at law. The right to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise belongs to the people, as a part of the sovereignty.⁴

Practice.—The usual mode of instituting *quo warranto* proceedings is for the state's attorney to submit a motion, based on affidavits, for leave to file an information. A rule *nisi* is then entered requiring the defendant to show cause why the information should not be filed. The respondent may then answer the rule by counter affidavits.⁵

When leave to file information will be granted.—It is not granted of course, but depends on the sound discretion of the court upon the circumstances of the case.⁶

It will usually be granted where the right, or the facts on which the right depends, is disputed and doubtful;⁷ or where the right turns upon a point of new or doubtful law;⁸ or where there is no other remedy.⁹

In a proceeding by *quo warranto*, the issue of a writ does not end the discretion of the court. Where the writ has been improvidently issued the court may decline to proceed or to grant the relief sought.¹⁰

¹ *People v. Cooper*, 139 Ill. 461; *People v. Dr. Com.*, 31 Ill. App. 219; *People v. R. R. Co.*, 54 Ill. App. 348.

² *King v. Francis*, 2 T. R. 484; 2 Kyd on Corp. 439; *Commonwealth v. Commissioners*, 1 Serg. & Rawle 385; *People v. R. R. Co.*, 13 Ill. 66; *Donnelly v. People*, 11 Ill. 552; *Eslinger v. People*, 47 Ill. 384.

³ *People v. Boyd*, 132 Ill. 60; *People v. Boyd*, 30 Ill. App. 608.

⁴ *Snowball v. People*, 147 Ill. 260.

⁵ *King v. Symons*, 4 T. R. 221; *People v. Tibbits*, 4 Cow. 383; *People v.*

Richardson, 4 Cow. 103; *People v. R. R. Co.*, 54 Ill. App. 348.

⁶ *People v. Waite*, 70 Ill. 25; *People v. Callaghan*, 83 Ill. 128; *People v. R. R. Co.*, 88 Ill. 537; *People v. Golden Rule*, 114 Ill. 34; *Att'y v. R. R. Co.*, 112 Ill. 520; *People v. R. R. Co.*, 54 Ill. App. 348.

⁷ *Rex v. Latham*, 3 Burr. 1485; 1 Bl. Rep. 468.

⁸ *Rex v. Carter*, Cowp. 58; *Rex v. Goodwin*, Doug. 397; *People v. Richardson*, 4 Cow. 102.

⁹ Cas. K. B. 225; Bull N. P. 212.

¹⁰ *People v. Hamilton*, 24 Ill. App.

When leave to file will not be granted.—If the defendant can show that his right has already been determined by *mandamus*, or that it depends on the right of those who voted for him, which has not been tried; ¹ or that the person upon whose right the defendant's title depends has enjoyed his franchise so long that the court would not permit it to be impeached in this mode of proceeding, the information will be denied.² So if the defendant's right has been acquiesced in for a length of time.³

So the information will not be granted if it appears that the time for which the officer was elected will expire before the inquiry can have any effect.⁴

In England, it seems, the court will not grant an information to try the validity of an election to the office of church warden, because it is no usurpation of the crown.⁵

But in Pennsylvania an information has been granted against persons exercising the office of trustees of a church corporation,⁶ and it is said to be settled, in this country, that an information will lie against any one who intrudes himself into an office of a private corporation.⁷

Limitations.—At common law the time within which a corporate office might be impeached by a *quo warranto* was indefinite; it varied with the circumstances of each particular case;⁸ and it was for some time thought better that it should be unsettled.⁹ At length, however, the court (the king's bench) set a limit to its discretionary power, and confined the time, in analogy to other cases of limitations, within twenty

609; *Com. v. Cheely*, 56 Pa. St. 270; *People v. Drain. Com.*, 31 Ill. App. 219; *People v. R. R. Co.*, 54 Ill. App. 348.

¹ 2 Hawk. P. C., chap. 26, sec. 9.

² *Rex v. Stephens*, 1 Burr. 433; *Rex v. Peacock*, 4 Term R. 634.

³ Bac. Abr., Information.

⁴ *People v. Sweeting*, 2 Johns. 184; *Commonwealth v. Athearn*, 3 Mass. 285; see *Clark v. People*, 15 Ill. 213.

⁵ *Rex v. Master*, 4 Term R. 381; see *People v. De Mill*, 15 Mich. 164.

⁶ *Commonwealth v. Arrison*, 15

S. & R. 127; see *Lawson v. Kolbenson*, 61 Ill. 405; *People v. Moore*, 73 Ill. 132.

⁷ Ang. & Ames on Corp., sec. 736; *People v. Moore*, 73 Ill. 132; *Lawson v. Kolbenson*, 61 Ill. 405.

⁸ *Rex v. Powell*, 8 Mod. 165; and see *Rex v. Stacey*, 1 T. R. 1; *Rex v. Pike*, 8 Mod. 286, cited; and *Rex v. Newling*, 3 T. R. 311; *Rex v. Bond*, 2 T. R. 767.

⁹ *Rex v. Latham*, 3 Burr. 1485, 1486.

years,¹ and at length to six years;² and the last period was confirmed by parliament, by stat. 32, Geo. 3, 58.

In the absence of any statutory period of limitation, it is held in this country that the attorney-general may file an information in behalf of the people at any time; and that the lapse of time constitutes no bar to the proceeding, in conformity with the maxim, *nullum tempus occurrit regi*.³

It is a familiar doctrine that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, will not fall within the doctrine of estoppel.⁴

The statute applies, however, when the object of the action is to enforce private rights as distinguished from public rights,⁵ and the period of limitation has been held to be five years.⁶

The statute of limitation may be interposed by demurrer when the declaration discloses the proper facts to raise the question.⁷

When it lies.—By section 1 of the “Quo Warranto” act, it is provided

“That in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation created by authority of this state (or any person shall hold or claim to hold or exercise any privilege, exemption or license, which has been improperly or without warrant of law issued or granted by any officer, board, commissioner, court, or other person or persons authorized or empowered by law to grant or issue such privilege, exemption or license), or any public officer shall have done or suffered any act

¹ *Winchester Causes*, 4 Burr. 1962, 2022, 2121, 2523; *People v. Richardson*, 4 Cow. 103; see *State v. Miami Co.*, 11 Ohio 126.

² *Rex v. Dicken*, 4 T. R. 282; *King v. Peacock*, 4 T. R. 684; R. G. Hill. T. 1791.

³ *Catlett v. People*, 151 Ill. 16; High's Ext. Leg. Rem., Sec. 621; see *People v. R. R. Co.*, 54 Ill. App. 348; *McPhail v. People*, 160 Ill. 77.

⁴ *Catlett v. People*, 151 Ill. 16; *People v. Brown*, 67 Ill. 435; *People v. Gilbert*, 18 Johns. 227; *Bank v. Brown*, 1 Scam. 106.

⁵ *People v. Boyd*, 132 Ill. 60; S. C., 30 Ill. App. 608.

⁶ *People v. Boyd*, 132 Ill. 60.

⁷ *Henry v. Co. Drain. Co.*, 52 Ill. 454; *Ilett v. Collins*, 103 Ill. 74; *Bank v. Jenkins*, 104 Ill. 143; *Bell v. Johnson*, 111 Ill. 374.

which, by the provisions of law, works a forfeiture of his office; or any association or number of persons shall act within this state as a corporation, without being legally incorporated; or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law; or if any railroad company doing business in this state shall charge an extortionate rate for the transportation of any freight or passenger, or shall make any unjust discrimination in the rate of freight or passenger tariff over or upon its railroad, the attorney-general or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a *quo warranto* in the name of the people of the State of Illinois, and if such court or judge shall be satisfied that there is probable ground for the proceedings, the court or judge may grant the petition and order the information to be filed and process to issue. When it appears to the court or judge that the several rights of divers parties to the same office or franchise, privilege, exemption or license, may properly be determined on one information, the court or judge may give leave to join all of such persons in the same information in order to try their respective rights to such office, franchise, privilege, exemption or license."¹

Under this section, as amended in 1881, the suit lies by the attorney-general against licensee to test the validity of a license to keep a dram-shop.²

One of the objects of an information of this nature is to call in question the title to an office or franchise claimed and exercised by the defendant, because of some alleged defect in such title; as, for instance, that at the time of the election of the defendant to an office, he was disqualified to be elected; or that the election itself was void or irregular; or that the defendant was not duly elected, or not duly appointed; or that he has not been duly sworn in, or has been otherwise unlawfully

¹ Rev. Stat. (1893), 1087; Rev. Stat. (1895), 1171; 2 Starr & Curtis, 1871.

² *Swarth v. People*, 109 Ill. 621; *Handy v. People*, 29 Ill. App. 99.

admitted; or that he has since become disqualified, and yet presumes to act.¹

A defective title is understood to be, and is, in contemplation of law, the same as no title whatever; and a person exercising an office or franchise of a public nature is considered as a mere usurper unless he has a good and complete title in every respect.²

The question as to whether a person who claims the right and exercises the powers of a public office, has been lawfully elected, may be tested by *quo warranto* and the incumbent ousted if he has usurped the same.³ Where a person is in office by color of right, the remedy is not by mandamus to admit another having lawful claim, but by information in the nature of a *quo warranto*.⁴

An information lies, under our statute, not only against a person who has usurped or intruded into an office, but also against a person who unlawfully holds an office to which he was at first entitled. If an officer rightfully elected and qualified exercises the functions of his office after its termination, by subsequent occurrences, this proceeding is the appropriate remedy to oust him.⁵

An information will lie against a corporation or an individual,⁶ and against officers appointed by the executive, as well as those holding corporate offices or franchises.⁷ The legality of the organization of a corporation can be attacked and judicially examined only in a direct proceeding by *quo warranto*.⁸

¹ *People v. Ridgley*, 21 Ill. 65; *People v. Whitcomb*, 55 Ill. 172; *People v. Waite*, 70 Ill. 25; *Eslinger v. People*, 47 Ill. 384; *People v. Beach*, 77 Ill. 52; *Hinze v. People*, 92 Ill. 406; *McPhail v. People*, 56 Ill. App. 289; *Greenwood v. Murphy*, 131 Ill. 604.

² *People v. Ridgley*, 21 Ill. 65; see *Clark v. People*, 15 Ill. 213; *People v. Ins. Co.*, 15 Johns. 358; *Simons v. People*, 18 Bradw. 588.

³ *Snowball v. People*, 43 Ill. App. 241; *Snowball v. People*, 147 Ill. 260; *Rafferty v. McGowan*, 136 Ill. 620; *Burgess v. Davis*, 138 Ill. 578.

⁴ *People v. Forquer*, Breese 104; *People v. Fletcher*, 2 Scam. 487; *People v. Matteson*, 17 Ill. 167; see *People v. Mobley*, 1 Scam. 215; *People v. Whitcomb*, 55 Ill. 172; *Rafferty v. McGowan*, 136 Ill. 620.

⁵ *Burgess v. Davis*, 138 Ill. 578.

⁶ *Cas. K. B.* 225; *Bull. N. P.* 212; see *Commonw. v. Ins. Co.*, 5 Mass. 230.

⁷ *Commonwealth v. Fowler*, 10 Mass. 290; *Renwick v. Hall*, 84 Ill. 162; *Lawson v. Kolbenson*, 61 Ill. 405; *Sullivan v. People*, 18 Bradw. 627.

⁸ *Lees v. Dr. Com.* 125 Ill. 47.

Where an incorporated company carries on banking operations, without authority from the legislature, this information lies,¹ and it is the proper mode of testing the question of the forfeiture of a charter.²

The right to preside over the meetings of a city council is a franchise given by law; and if invaded, the remedy is by information in the nature of a *quo warranto*.³ Where a part is attempted to be taken from a school district and added to another, the legality of the change can be tested by *quo warranto*.⁴

Whether or not a railroad company is a *bona fide* corporation, within the meaning of the law and spirit of the law, can only be determined by *quo warranto*.⁵

A municipal body which has exceeded its jurisdiction and has proceeded illegally, may be proceeded against either by *quo warranto*, *scire facias*, or the common law writ of *certiorari*.⁶

Where the legality of the formation and organization of a drainage district, or the validity of the annexation of land to a drainage district, under the drainage act of 1885, is questioned, the proper remedy is a *quo warranto* against the drainage commissioners.⁷

Quo warranto lies against one who wrongfully assumes to act as a drainage commissioner.⁸

When a corporate body assumes powers which, from defect in its organization, it can not legally exercise, *quo warranto* is the proper remedy.⁹

It is the proper proceeding to test the eligibility of a per-

¹ *People v. Ins. Co.*, 15 Johns. 358.

² *Baker v. Adm'r*, 32 Ill. 79; *Williams v. Bank*, 1 Gilm. 667; *People v. R. R. Co.*, 15 Wend. 113; *People v. Bristol*, 23 Wend. 222; *King v. Pasmore*, 3 T. R. 132; see *Commonwealth v. Turnpike Co.*, 6 B. Mon. (Ky.) 397; *People v. Bank*, 6 Cowen 217; *H. Ry. Co. v. City*, 47 Ill. App. 388.

³ *Cochran v. McLeary*, 22 Iowa 75; see *People v. Bird*, 20 Bradw. 568.

⁴ *People v. Trustees*, 87 Ill. 41;

Trumbo v. People, 75 Ill. 561; *Renwick v. Hall*, 84 Ill. 162; *People v. Bd. of Education*, 101 Ill. 308.

⁵ *Brown v. Ry. Co.*, 125 Ill. 600.

⁶ *Comm. v. Griffins*, 134 Ill. 330; see *People v. City*, 61 Ill. App. 86.

⁷ *Bodman v. Drain. Dist.*, 132 Ill. 439; *Evans v. Lewis*, 121 Ill. 478; *Keigwin v. Dr. Com.*, 115 Ill. 347; *People v. Jones*, 137 Ill. 35.

⁸ *Smith v. People*, 140 Ill. 355; S. C., 39 Ill. App. 238.

⁹ *Baker v. Backus*, 32 Ill. 79.

son to hold the office of circuit judge;¹ or of members of city council;² or of wharf master;³ or of city marshal;⁴ or of school trustees.⁵

It is the proper remedy to test the legality of the organization of a school district;⁶ or of a village.⁷

It lies against a person holding and executing an office created by unconstitutional law.⁸

It is a proper remedy if a board of education undertakes to exercise powers it does not possess.⁹

It is not a proper proceeding to test the validity of an act extending the territorial limits of a city;¹⁰ nor to test the validity of a contract entered into by a municipal corporation;¹¹ nor to contest the election for the adoption of a city charter;¹² nor to test the legality of the official action of public or corporate officers.¹³

The extraordinary remedy by *quo warranto* is not grantable where the party aggrieved can obtain full and adequate relief in the usual course of proceeding at law, or where the grievance may be redressed by bill in equity.¹⁴

Parties.—If the information is for the abusing of a franchise by a corporation, it should be against the corporation; if for usurping to be a corporation, it should be against the particular persons.¹⁵ It will not lie on the relation of an individ-

¹ *Smith v. People*, 44 Ill. 16.

² *People v. Bird*, 20 Ill. App. 568.

³ *Ensminger v. People*, 47 Ill. 384.

⁴ *People v. Canty*, 55 Ill. 33.

⁵ See *Simons v. People*, 18 Ill. App. 588; *People v. Moore*, 73 Ill. 132; see *Lawson v. Kolbenson*, 61 Ill. 405.

⁶ *Renwick v. Hall*, 84 Ill. 162; *Ward v. Farwell*, 97 Ill. 593; *Trumbo v. People*, 75 Ill. 561; *People v. Newberry*, 87 Ill. 41; *Sch. Dir. v. Sch. Dir.*, 135 Ill. 464; *People v. Ricker*, 142 Ill. 650; *Rayfield v. People*, 144 Ill. 332.

⁷ *Kamp v. People*, 141 Ill. 9; *Poor v. People*, 142 Ill. 309.

⁸ *Hinze v. People*, 92 Ill. 406.

⁹ *People v. Board of Education*, 101 Ill. 308.

¹⁰ *People v. Whitcomb*, 55 Ill. 172.

¹¹ *People v. City*, 61 Ill. App. 86.

¹² *Chicago v. People*, 80 Ill. 496.

¹³ High Ext. Leg. Rem., 2d Ed., Sec. 618; *People v. Whitcomb*, 55 Ill. 172; *People v. Wyatt*, 34 Ill. App. 454.

¹⁴ High Ext. Leg. Rem., Sec. 617; *People v. Whitcomb*, 55 Ill. 172; *People v. Springfield*, 61 Ill. App. 86.

¹⁵ 2 Roll. Rep. 113, 115; see *People v. R. Co.*, 88 Ill. 537; *People v. Spg. Valley*, 129 Ill. 169; *People v. O'Hair*, 128 Ill. 26.

ual, against a corporation as a body. This should always be by the attorney-general.¹

If on the relation of a private person, it should be against the several individuals, to show by what authority they claim their respective franchises.² If the information is at common law, there is no relator.³

Motion for leave to file information.—The first step towards the filing of an information, at the relation of any person, is a motion by the attorney-general, or state's attorney, based on an affidavit or affidavits, for leave to file such information.⁴

If the applicant makes out a case *prima facie*, the usual course is for the court to grant a rule *nisi* on the defendant, to show cause why the information should not be filed; and on the day appointed, or at such time thereafter as the court may fix, he may show cause against the rule, and exhibit counter affidavits.⁵

This rule can not be applied, however, when the application is made to a judge in vacation, as a judge can exercise no judicial functions in vacation, unless expressly authorized to do so.⁶

For the requisites of the affidavits on both sides, and observations thereon, see note.⁷

Unless the cause shown is such as to put the matter beyond dispute, the court will make the rule absolute for the information, in order that the question of the right may be properly determined.⁸

Form of information.—The outline of the English form is given in 4 Cow. R. 106, from 2 Kyd on Corp. 403; and a variety of English precedents will be found in 6 Wentworth's

¹ *Chicago v. People*, 80 Ill. 496; *People v. Board*, 101 Ill. 308; *Swarth v. People*, 109 Ill. 621; *People v. Golden Rule*, 114 Ill. 34; *Chesshire v. People*, 116 Ill. 493.

² *Rev v. Carmarthen*, 2 Burr. 869.

³ Bull. N. P. 211; see *Chesshire v. People*, 116 Ill. 493.

⁴ See *People v. Mobley*, 1 Scam. 215; *People v. Golden Rule*, 114 Ill. 34.

⁵ See *People v. Shaw*, 14 Ill. 476; *People v. R. Co.*, 88 Ill. 537; *People v. McFall*, 124 Ill. 642.

⁶ *People v. McFall*, 124 Ill. 642.

⁷ *People v. Richardson*, 4 Cow. R. 105-106, and Ang. & Ames on Corp. Secs. 748, 749.

⁸ Bull. N. P. 210; *People v. Richardson*, 4 Cow. 106; *Att'y Gen. v. R. R. Co.*, 112 Ill. 520.

Pleadings, 28 to 234. In Illinois, an information must be "in the name and by the authority of the People of the State of Illinois," and conclude "against the peace and dignity of the same,"¹ if it does not, advantage can be taken either in arrest or on error.² And it should be drawn with the same certainty as an indictment or declaration.³

Summons.—"Sec. 2. On the filing of such information the clerk of the court shall issue a summons in like form as any other summons, commanding the defendant to appear at the return term thereof to answer the relator in an information in the nature of a *quo warranto*. If the information is filed in vacation, the summons shall be made returnable on the first day of the next succeeding term; if in term time, it may be made returnable on any day of the same term, not less than five days after the date of the writ, as shall be directed by the court."

Service of summons.—"Sec. 3. The summons may be served in the same manner as other summons in suits at law; but if any defendant resides, or is out of the state, he may be served with a copy of the information, in the same manner, and with like effect, and the service may be proved in the same way as provided in cases of bills in chancery."⁴

Defendant required to plead.—"Sec. 4. Every defendant who shall be summoned, or served with a copy of the information, as required in this act, shall be held to demur or plead to the information on the return day of the summons, or when served with a copy of the information at the expiration of the time required to be given, or within such further time as may be granted by the court, or in default thereof, judgment may be taken, *nil dicit*."

The defendant should either disclaim or justify; and if he justifies he should set out his title specially. He must exhibit

¹ *People v. R. R. Co.*, 13 Ill. 67; *Wright v. People*, 15 Ill. 417; *Hay v. People*, 59 Ill. 94; *Chesshire v. People*, 116 Ill. 493.

² *Hay v. People*, 59 Ill. 94.

³ *People v. Higgins*, 15 Ill. 110;

Lavalle v. People, 68 Ill. 252; *Minch v. People*, 6 Bradw. 127; *Leeroix v. People*, 6 Bradw. 129.

⁴ *Lavalle v. People*, 68 Ill. 252; see *People v. Golden Rule*, 114 Ill. 34.

good authority or the people will be entitled to a judgment of ouster.¹

Burden of proof.—Where the matters alleged in an information against a corporation, or the relator's replication, as ground for the forfeiture of its character, are denied by the rejoinder, the burden will rest upon the relator to prove, by a preponderance of the evidence, that the defendant has committed or omitted acts which amount to a surrender or forfeiture of its rights and privileges as a corporation.²

Time to plead, etc.—"Sec. 5. The court in which any information as aforesaid, is filed, may allow the relator or defendant such convenient time to plead, reply or demur, as it shall deem just and reasonable."

Judgment.—"Sec. 6. In case any person or corporation against whom any such information is filed, is adjudged guilty as charged in the information, the court may give judgment of ouster against such person or corporation from the office or franchise and fine such person or corporation for usurping, intruding into, or unlawfully holding and executing such office or franchise, and also give judgment in favor of the relator for the costs of the prosecution: Provided, that instead of judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, the court may fine the person or corporation found guilty in any sum not exceeding twenty-five thousand dollars (\$25,000) for each offense. Whenever judgment is given for any defendant in such information, the person or corporation to whom judgment is given shall recover costs against the relator."

The judgment upon information, charging defendant with usurping, unlawfully entering and exercising powers of an office, etc., if against the defendant, is that he is guilty as charged in information and of ouster.³

The judgment of ouster against an alleged municipal corpo-

¹ *Clark v. People*, 15 Ill. 213; *Ill. M. R. Co. v. People*, 84 Ill. 426; *Holden v. People*, 90 Ill. 434; *Simons v. People*, 18 Ill. App. 588; *Carrico v. People*, 123 Ill. 198.

² *Ibid.*; *N. & S. Stock Co. v. People*, 147 Ill. 234.

³ *Simons v. People*, 18 Ill. App. 588.

ration has the effect to dissolve it, whether it existed *de jure* or *de facto*, and to completely extinguish it.¹

A judgment of ouster is conclusive upon the defendants in the proceeding.²

Appeal and writ of error.—"Sec. 7. Appeals and writs of error may be taken and prosecuted in the same manner, and upon the same terms, and with like effect as in other civil cases."

Process.—Section 10 of the Practice Act of 1872 is as follows:

"It shall not be necessary hereafter, in any action of mandamus or *quo warranto*, to set out the cause of action in the writ, but it shall be sufficient to summon the defendant in a summons in the usual form, commanding the defendant to appear and answer the plaintiff in an action of mandamus or *quo warranto*, as the case may be, and the issues shall be made up by answering, pleading or demurring to the petition as in other cases."³

*No. 306. Information by the attorney-general, ex officio, against a corporation, for exercising franchises without authority.*⁴

In the —Circuit Court.

— Term, 18—.

STATE OF ILLINOIS, }

County of —, } sct. A. B., attorney-general of the said State of Illinois, who sues for the People of the said state in this behalf, comes into the court here, on this day, and for the said People, and in the name and by the authority thereof, gives the court here to understand and be informed, that the — — company, for the space of — months last past, and more, in the county of — aforesaid, has used, and still does use, without any warrant, charter or grant, the following liberties, privileges and franchises, to wit, [that of becoming proprietors of a bank or fund for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks may and do transact by virtue of their respective acts of incorporation, and also that of actually issuing notes, receiving deposits, making discounts, and carrying on banking operations and other moneyed transactions which are usually performed by incorporated banks, and which they alone have a right to do;] all which said liberties, privileges and franchises the said — — company, during all the time aforesaid, in the county aforesaid, upon the said People has usurped,

¹ *Dodge v. People*, 113 Ill. 491.

² *Waterman v. R. R. Co.*, 139 Ill.

³ 2 Starr & Curtis 1780; Rev. Stat.

(1893) 1088; Rev. Stat. (1895) 1172.

⁴ *People v. Ins. Co.*, 15 Johns. 36.

and still does usurp; to the damage and prejudice of the said People, and against the peace and dignity of the same. Whereupon the said attorney-general, for the said People, and in the name and by the authority thereof, prays the consideration of the court here in the premises, and due process of law in this behalf, to make the said — — company answer to the said People by what warrant it claims to have, use and enjoy the liberties, privileges and franchises aforesaid.

A. B., Attorney-General.

The information need not show any title in the People to the franchise, but it lies with the defendant to show a warrant for exercising such franchise; and if the title set up is incomplete, the People is entitled to judgment.¹ See the cases reported in 6 Cow. R. 196, 211, 217. In these cases, the informations charged the corporations generally with usurpations; and on the defendants setting out their charters, and justifying under them, the attorney-general replied the causes of forfeiture specially; and this was held to be no departure.

No. 307. Information at the instance of a relator, under the statute.²

(*Title of court, etc., as in last precedent.*) A. B., state's attorney for the said county of —, who sues for the People of the said State of Illinois in this behalf, comes into the court here, on this day, and for the said People, and in the name and by the authority thereof, at the relation of E. F. (according to the form of the statute in such case made and provided,) gives the court here to understand and be informed, that C. D., for the space of — — now last past, and more, in the county aforesaid, unlawfully has held and executed, and still does hold and execute, without any warrant or right whatsoever, the office (*or "franchise," or "office and franchise"*) of — —; which said office (*or "franchise," etc.,*) the said C. D., during all the time aforesaid, in the county aforesaid, upon the said People has usurped, and still does usurp; to the damage and prejudice of the said People, and against the peace and dignity of the same. (*) Whereupon the said state's attorney, for the said People, and in the name and by the authority thereof, at the relation of the said E. F., prays the consideration of the court here in the premises, and due process of law against the said C. D., to make him answer to the said People by what warrant he claims to hold and execute the office (*or "franchise," etc.,*) aforesaid.

A. B., State's Attorney.

¹ *People v. Ins. Co.*, 15 Johns. 362;
People v. Ridgley, 21 Ill. 65; *Simons*
v. People, 18 Bradw. 588.

² *Starr & Curtis*, 1871; *Rev. Stat.*
(1893) 1087; *Rev. Stat.* (1895) 1171.

If deemed expedient, another count, or counts, may be inserted, at the asterisk in the above form.

The information should describe the office or franchise which the defendant is alleged to hold and execute, so that it may be seen whether the case is within the statute or not.¹

The appearance of the defendant to a rule to show cause, etc., is not appearance to the information; and therefore, on filing the information, the prosecutor is not entitled to a rule to plead, but there must be a service of process, or an appearance. The rule to show cause is for the purpose of obtaining leave to institute the proceeding, but it is commenced by the information.²

It is said that "in this country it seems to be not an unusual practice for the information, whether it be for an intrusion into or usurpation of an office, or for an assumption or continued exercise of corporate powers without right, to set forth specially the right of the relator who claims the office, as well as the usurpation of the defendant."³

Where an information is filed to test the question of an intrusion into or usurpation of an office, it is sufficient to allege, generally, that the defendant is in possession of the office without lawful authority.

The rules of pleading do not require that the pleader shall anticipate that the defense will justify under an election, and show in advance the invalidity of such election. If the election is pleaded, its invalidity is a matter to be shown by replication.⁴

Amendments.—The information and proceedings thereon are amendable in the discretion of the court, both under the common law and the statute.⁵

An amendment is properly refused where the same is contrary to and inconsistent with the terms of the information.⁶

¹ *People v. Ridgley*, 21 Ill. 65; *Lavalle v. People*, 68 Ill. 252.

² Ang. & Ames on Corp., Sec. 751; *Commonw. v. Sprenger*, 5 Binn. 358; *Hambleton v. People*, 44 Ill. 458; see Rev. Stat. (1893), 1088.

³ Ang. & Ames on Corp., Sec. 756.

⁴ *Ibid.*; *People v. Cooper*, 139 Ill. 461.

⁵ *Hinze v. People*, 92 Ill. 406; *Handy v. People*, 29 Ill. App. 99; *Starr & Curtis' An. Stat.* 265.

⁶ *People v. Spring Valley*, 129 Ill. 169.

See the substance of an information against certain persons exercising the office of bridge commissioners, 14 Ill. 476.

DEFENSES.

For pleas in abatement, see Defenses to an Action, *ante*.

The pleadings in *quo warranto* proceedings should conform as far as possible to the general principles and rules which govern in civil actions.¹

Pleas to the information.—The defendant must either justify or disclaim. If he justifies, he must set out his title fully and particularly, showing by what right he uses or holds the franchise or office; and general allegations are insufficient.²

Disclaimer and justification are repugnant and inconsistent in this proceeding, and a plea attempting to join them is subject to demurrer.³

Not guilty, and *non usurpavit*, are not good pleas, for they do not answer to the nature of the charge, which is to show by what authority the defendant uses the franchise, etc.⁴

The sufficiency of the information, in point of substance, to sustain a judgment, is reviewable on error, whether previously challenged by demurrer or not.⁵

The People, in this proceeding, is not required to show anything, at least in the first instance, but the entire burden is on the defendant; and (unless he disclaims) he must show by his plea, and prove that he has a valid title to the office or franchise. He must set out by what warrant he exercises or uses such office or franchise, and must show good right thereto, or the People will be entitled to judgment of ouster.⁶

A party exercising an office or franchise of a public nature is considered as a mere usurper, unless he has a good and com-

¹ *D. & C. F. Co. v. People*, 156 Ill. 448.

² *Clark v. People*, 15 Ill. 213; *Ry. Co. v. People*, 84 Ill. 426; *Gunterman v. People*, 138 Ill. 518; *Holden v. People*, 90 Ill. 434; *D. & C. F. Co. v. People*, 156 Ill. 448.

³ *D. & C. F. Co. v. People*, 156 Ill. 448.

⁴ *People v. Richardson*, 4 Cow. 118; *Crook v. Jayne*, 106 Ill. 237.

⁵ *D. & C. F. Co. v. People*, 156 Ill. 448.

⁶ *People v. Ridgley*, 21 Ill. 65; *People v. Ins. Co.*, 15 Johns. 358; *Holden v. People*, 90 Ill. 434; *Gunterman v. People*, 138 Ill. 518; *Carrico v. People*, 123 Ill. 198.

plete title in every respect. A mere equitable title will not suffice.¹

No. 308. *Plea by a corporation, to an information by the attorney-general.*

In the — Circuit Court.

— Term, 18—.

The — — Company <i>ats.</i> The People, etc.	}	Information in nature of <i>quo warranto</i> . And now on this day comes the said — — company, by J. K., its attorney, and having heard the said information read, for plea in this behalf says, that (<i>here set forth the title to the franchise, etc.</i>): And by this warrant the said — — company has used during all the time in the said information mentioned, and still uses, the said liberties, privileges and franchises of, etc., etc., as the said — — company well might, and still may; without this, that the said — — company has usurped, or now does usurp, the liberties, privileges and franchises aforesaid, or any or either of them, upon the said People, as by the said information is above supposed. All which matters the said — — company is ready to verify, etc.; wherefore it prays judgment, etc.
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No. 309. *Plea to an information at the instance of a relator.*

In the — Circuit Court.

— Term, 18—.

C. D. <i>ats.</i> The People, etc., <i>ex rel.</i> E. F.	}	Information in nature of <i>quo warranto</i> . And now on this day comes the said C. D., by L. M., his attorney, and having heard the said information read, for plea in this behalf says, that (<i>here set out the election, appointment, or grant, and everything necessary to show a good title to the office or franchise</i>). And by this warrant the said C. D. has held and executed during all the time in the said information mentioned, and still holds and executes, the said office (<i>or “franchise,” or “office and franchise”</i>) of — —, as he well might and still may; without this, that he, the said C. D., has usurped, or now does usurp, the office (<i>or “franchise,” etc.</i>) aforesaid upon the said People, as by the said information is above supposed. All which matters the said C. D. is ready to verify, etc.; wherefore he prays judgment, etc.
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The precedents of pleas usually commence with a protestation of the insufficiency of the information, but this seems to be unnecessary. Various forms of pleas in bar will be found in 4 Cow. R. 114, 6 Cow. R. 196, 15 Johns. R. 363, 10 Mass. R. 295, 2 Halst. R. 201, and 5 Day's Cas. Err. 330; and the substance of a plea, adjudged sufficient, to an information against certain persons

¹ *Gunterman v. People*, 138 Ill. 518.

for exercising the office of bridge commissioners, is given in 14 Ill. R. 476. A number of English forms of pleas and subsequent pleadings will be found in 6 Wentw. Pl. 28 to 242.

The plea in bar should set out the defendant's title at length, and conclude with a general traverse, "without this, that he usurped, etc."¹ And where the title set forth is bad, but the user confessed, this amounts to a confession of the usurpation.² The defendant may either disclaim as to all the franchises mentioned in the information, or plead as to all; or he may plead as to part and disclaim as to part. See the forms of disclaimers in 4 Cow. 113, from 2 Kyd on Corp. 405.

Replication, etc.—After plea, the attorney for the state demurs or replies, and the subsequent proceedings are in the same manner as in civil actions.³ Where several things are necessary to make a complete title in the defendant, the attorney for the state may take issue on each; and if any one of the issues, on a matter essential to the title, is found against the defendant, there shall be judgment of ouster.⁴ The replication should not take issue on the general traverse, "without this, that he usurped, etc.," but should be to the special matter, that the defendant may know how to apply his defense.⁵

Authorities.—For an excellent summary of the law in relation to informations in the nature of a *quo warranto*, see the note to *People v. Richardson*, 4 Cow. R. 97; and see also Ang. & Ames on Corp., Sec. 731 to 765, and Abb. Dig. Corp. 595 to 600.

¹ *Rex v. Blagden*, Gilb. Rep. 145;
People v. Richardson, 4 Cow. 113.

² *Rex v. Phillips*, 1 Burr, 302; *People v. Richardson*, 4 Cow. 113.

³ *People v. Richardson*, 4 Cow. 118; 2 Kyd on Corp. 406.

⁴ *People v. Richardson*, 4 Cow. 118; Bac. Abr., Inf. D.; *Rex v. Downes*, 1 T. R. 435.

⁵ *People v. Richardson*, 4 Cow. 118; Bac. Abr., Inf. D.

CHAPTER XIX.

ARBITRATION AND AWARD.

Arbitration is an amicable mode of settling disputes by referring them to the decision of one or more individuals mutually agreed upon by the parties. The agreement is called a submission; the persons agreed upon are called arbitrators; and their decision is called an award. The purpose is to avoid needless and expensive litigation, and to expedite the settlement of controversies. The object has met with so much favor, that statutes have been enacted regulating and directing the proceedings. This class of submissions are called statutory submissions, and in all essential particulars, to be effective, must conform substantially to the statute.

I. STATUTORY SUBMISSION.

In suits pending.—Section 1 of chapter 10 of the statute of Illinois,¹ entitled "Arbitration and Award," provides

"That whenever the parties to any suit pending in any court of record shall be desirous and willing to submit the matter involved in such suit to the decision of arbitrators, an order shall be entered directing such submission to three impartial and competent persons, to be named in such order—such arbitrators to be agreed upon and named by the parties. But if the parties are unable to agree, each shall name one, and the court the third."

This section relates exclusively to pending suits; in which class of cases the court has authority to enter an order submitting the matter involved to three arbitrators to be named in the order.²

¹ 1 Starr & Curtis' An. Stat. 300; ² *Martine v. Harvey*, 12 Bradw. Rev. Stat. (1893) 163; Rev. Stat. 587; *Gregory v. Healy*, 61 Ill. 470. (1895) 166.

Under this section the court has no authority to order a submission to one arbitrator, or to any greater or less number than three; nor has the court authority to make an order of submission in respect to any matter not involved in a pending suit.¹

A stipulation in a suit to recover damages resulting from negligence, after the general issue is filed, to waive a jury and submit to the judge the question of the amount of damages sustained and that judgment should be entered for the amount found, does not render the proceeding an arbitration.²

Proceedings by arbitrators.—Section 2 of the statute referred to provides that

“The arbitrators appointed in pursuance to the foregoing provisions, or a majority of them, shall proceed with diligence to hear and determine the matters in controversy. They shall appoint a place and time for hearing, and adjourn the same from time to time, as may be necessary; and on the application of either party, and for good cause, they may postpone such hearing from time to time, not extending beyond the next term of the court in which the suit is pending, if the subject-matter be in suit.”

After the arbitrators shall have appointed a place and time for hearing, they should give the respective parties notice thereof. It is essential to the validity of an award that such notice be given as will afford them an opportunity to be heard.³

The duty of giving notice to the parties of the time and place of hearing of matters submitted to arbitration, devolves upon the arbitrators. They have it in charge to see that sufficient notification is made to each party, and without such notice the award will be void, unless the intention of the parties is that the arbitrators shall proceed without their presence.⁴

¹ *Martine v. Harvey*, 12 Bradw. 587; *Low v. Nolte*, 15 Ill. 368; *Hamilton v. Hamilton*, 27 Ill. 158; *Chickering v. DeVoll*, 55 Ill. App. 442.

² *Brown v. Brick Co.*, 132 Ill. 648.

³ *Williams v. Schmidt*, 54 Ill. 205; *Ingraham v. Whitmore*, 75 Ill. 24;

Alexander v. Cunningham, 111 Ill. 511; *Towing Co. v. Taylor*, 126 Ill. 250; *Ins. Co. v. Hamilton*, 48 Ill. App. 593.

⁴ *Towing Co. v. Taylor*, 126 Ill. 250.

To set aside an award for want of notice of the time and place of hearing, it is not necessary to show corruption on the part of the arbitrators.¹

Oath of arbitrators.—Section 3 of the act relating to arbitrations and awards, requires that

“Before proceeding to hear any testimony in the cause, the arbitrators shall be sworn faithfully to hear, examine and determine the cause, according to the principles of equity and justice, and to make a just and true award according to the best of their understanding; which oath may be administered by any officer authorized to administer oaths.”

There seems to be a conflict of authority as to whether a statutory award is valid, if the arbitrators are not sworn, where the statute directs that they shall be. In Louisiana and Kentucky it has been held that the award is void if they are not sworn.² In New Jersey it has been decided both ways.³ In New York, Missouri, Wisconsin and Illinois, and perhaps in other states, it is held that the parties may waive the requirement of the statute; and that if they tacitly go on with the hearing before unsworn arbitrators, they shall be deemed to have so waived the oath.⁴

It would certainly be a fraud for one of the parties, noticing the omission to take the oath required by the statute, to keep silent, and if the award should be favorable, to still remain silent, but if unfavorable, to move to set it aside because of the undisclosed omission; and it is doubtful whether the neglect to take the oath would be fatal, even on a motion for judgment under the statute.⁵

An arbitrator will not be allowed to impeach his award by merely saying that he and his co-arbitrators neglected to be sworn.⁶

¹ *Elmendorff v. Harris*, 23 Wend. 628; *Ingraham v. Whitmore*, 75 Ill. 24; *Reeves v. Eldrig*, 20 Ill. 383; *Alexander v. Cunningham*, 111 Ill. 516.

² *Overton v. Alpha*, 13 La. Ann. 558; *French v. Moseley*, 1 Littell 247; *Lile v. Barnett*, 2 Bibb 166.

³ *Ford v. Potts*, 1 Halst. 393; *contra*, *Inslee v. Flagg*, 2 Dutcher, 365.

⁴ *Howard v. Sexton*, 1 Denio 440; *Howard v. Sexton*, 4 Comst. 157; *Browning v. Wheeler*, 24 Wend. 258; *Tucker v. Allen*, 47 Mo. 488; *Hill v. Taylor*, 15 Wis. 190; *R. R. Co. v. Alfred*, 3 Bradw. 511.

⁵ *R. R. Co. v. Alfred*, 3 Bradw. 511.

⁶ *Stone v. Atwood*, 28 Ill. 30; *R. R.*

Whether arbitrators are sworn or not, the award will be binding as a common law award, and the party in whose favor it is rendered, can not, merely because the arbitrators were not sworn, be deprived of his right to sue upon the award, or file a bill to enforce its performance. If the submission does not require the arbitrators to be sworn, the award is clearly valid as a common law award.¹

To entitle the prevailing party to a judgment upon the award, the arbitrators should be sworn as well as the witnesses. The solemnities under which testimony is taken, as provided in the statute, must not be disregarded.² But it need not appear upon the face of the award that the arbitrators were sworn.³

Subpœnas—Witnesses—Swearing same.—It is provided in section 4 of the statute referred to, that

“The several clerks of the circuit courts, and the justices of the peace in their several counties, may issue subpœnas for the attendance of witnesses before arbitrators; if any witness after being duly summoned, shall fail to attend, the arbitrators may issue an attachment to compel his attendance, and the said witness shall moreover be liable to the party for refusing to attend the same as in trials at law. Any one of the arbitrators may administer oaths and affirmations to witnesses; they may punish contempts committed in their presence during the hearing of a cause, the same as a court of record, and may admit depositions to be read in evidence, the same as in trials at law.”

The hearing.—It is a rule that all the arbitrators must act, and act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all, for the parties are entitled to have recourse to the arguments, experience and judgment of each

Co. v. Alfred, 3 Bradw. 511; *Pulliam v. Pensoneau*, 33 Ill. 375.

¹ *Eisenmeyer v. Sauter*, 77 Ill. 515; *Smith v. Douglas*, 16 Ill. 34; *Ross v. Hammond*, 16 Ill. 99; *R. R. Co. v. Alfred*, 3 Bradw. 511; *Tynan v. Tate*, 3 Neb. 388; *Woodrow v. O'Connor*, 28 Vt. 776; *Winship v.*

Jewett, 1 Barb. Ch. 173; *Bradstreet v. Erskine*, 50 Me. 407.

² *Gregory v. Healy*, 61 Ill. 470; *Jackson v. Steele*, Sneed (Ky.) 21; *Otis v. Northrop*, 2 Miles (Penn.) 330.

³ *R. R. Co. v. Alfred*, 3 Bradw. 511; *Duncan v. Fletcher*, Breese 323.

arbitrator at every stage of the proceedings, brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving at a just decision.¹

So when any evidence is heard in the absence of one of the arbitrators without the assent of one of the parties, and an award is made against him, it will be invalid, and may be set aside at the instance of such party.²

Publication of award.—Section 5 of the same statute provides that “the award of the arbitrators, or a majority of them, shall be drawn up in writing, and signed by such arbitrators, or a majority of them, and a true copy of such award shall, without delay, be delivered to each of the parties thereto.”

The award.—The authority of arbitrators is derived entirely from the submission, consequently their award must not embrace any matters not submitted to them; and if it does, it will be void at least for the excess.³ If it contains any allowance for matters not submitted, it is wholly void if it is not distinguishable from the residue, and unless it appears that the consideration of the unsubmitted matters was so disconnected from the residue as to have had no influence upon it.⁴ But the award will stand if the parties ratify it;⁵ and if one party accepts from the other party part performance of his part of such an award, he is estopped from afterward setting up its invalidity.⁶ An award in excess of the matter submitted does not annul the original contract which was the subject of the reference, further than the award pursues the submission, nor then if it is void *in toto*, because the parties are left precisely the same as though no award had been made.⁷

Unless the award upon its face shows that matters not sub-

¹ Russell on Arbitration, 209; *Smith v. Smith*, 28 Ill. 56.

² *Towing Co. v. Taylor*, 126 Ill. 250.

³ *Sherfy v. Graham*, 72 Ill. 158; *Alfred v. R. R. Co.*, 92 Ill. 609.

⁴ *Busse v. Agnew*, 10 Bradw. 527; *Buntain v. Curtis*, 27 Ill. 374; *Stearns v. Cope*, 109 Ill. 340.

⁵ *Bullitt v. Musgrove*, 3 Gill. 31;

Penniman v. Patchin, 6 Vt. 325; *Duncan v. Fletcher*, Breese 323; *Cogswell v. Cameron*, 136 Mass. 518.

⁶ *Culver v. Ashley*, 19 Pick. 300; *Taylor v. St. Johnsbury*, 57 Vt. 106; *Connett v. City*, 114 Ill. 233.

⁷ *Walsh v. Gilmor*, 3 Gill 383; *Bullitt v. Musgrove*, 3 Gill 31.

mitted are embraced in it, it will be presumed that it only comprehends matters that were within the terms of the submission, and the burden is upon the party attacking it upon that ground to establish its excessive character.¹

In New Hampshire it is held that an award covering matters in excess of the submission will not be set aside for that reason, if the amount of the excess is ascertained and released or discharged.² But this would depend entirely upon the fact whether the excess could be readily ascertained, and distinguished from the residue.³

The award must be co-extensive with the submission, and cover all the matters submitted.⁴ And if the arbitrators refuse to decide upon some matters submitted, their award will be void.⁵ But even though the award does not in terms, yet if, in effect, it includes all matters submitted, it is valid.⁶

Where the arbitrators recite in their award that they have disposed of a matter submitted to their arbitrament, in the manner required by the agreement for the submission, it can not be shown by parol evidence of the arbitrators, that they disposed of such matters in another and different manner.⁷

An award must be certain to a common intent;⁸ but every intendment is made in its favor,⁹ where no fraud, corruption

¹ *Root v. Renwick*, 15 Ill. 461; *Hayward v. Harmon*, 17 Ill. 477; *McDonald v. Arnout*, 14 Ill. 58; *Tucker v. Page*, 69 Ill. 179; *Hubbard v. Firman*, 29 Ill. 90; *Parsons v. Aldrich*, 6 N. H. 264; *Reynolds v. Reynolds*, 15 Ala. 398; *Blair v. Wallace*, 21 Cal. 317.

² *Richardson v. Huggins*, 23 N. H. 106.

³ *Sawyer v. Freeman*, 35 Me. 542; *Glade v. Schmidt*, 20 Bradw. 157; *Lee v. Delano*, 39 N. J. Eq. 193; *Caldwell on Arbitration*, 321; *White v. Arthur*, 59 Cal. 336.

⁴ *Steere v. Brownell*, 113 Ill. 415; *Buntain v. Curtis*, 27 Ill. 374.

⁵ *Smith v. Potter*, 27 Vt. 304; *Harker v. Hough*, 7 N. J. Law 428; *Mul-*

dron v. Norris, 12 Cal. 333; *Buntain v. Curtis*, 27 Ill. 374.

⁶ *Smith v. Demarest*, 8 N. J. Law 195; *Harden v. Harden*, 11 Gray, 435; *Pearce v. McIntyre*, 29 Mo. 493.

⁷ *Schmidt v. Glade*, 126 Ill. 485.

⁸ *Burrows v. Guthrie*, 61 Ill. 70; *Howard v. Babcock*, 21 Ill. 259; *Redmond v. Redford*, 40 Ill. 267; *Ingraham v. Whitmore*, 75 Ill. 24; *Alfred v. R. R. Co.*, 92 Ill. 609; *McDonald v. Bacon*, 3 Scam. 428; *Tucker v. Page*, 69 Ill. 179.

⁹ *Root v. Renwick*, 15 Ill. 461; *McMillan v. James*, 105 Ill. 194; *Gudgell v. Pettigrew*, 26 Ill. 305; *Whitmore v. Mason*, 14 Ill. 392; *Shear v. Mosier*, 8 Bradw. 119; *Darst v. Collier*, 86 Ill. 96.

or unfairness is shown.¹ In order to invalidate an award upon the ground that it does not embrace all the matters submitted, it must appear that they were made known to the arbitrators, and that they declined or neglected to pass upon them.²

Prima facie, an award is good, although not co-extensive with the submission, because it is presumed that it embraces all that was called to the attention of the arbitrators; and if in fact other matters *were* called to their attention, and not passed upon by them, the fact must be proved.³

Either party not complying, award may be filed in court.—Section 6 of the act in relation to arbitrations and awards provides that

“If either of the parties neglect to comply with the said award, the other party may, at any time within one year from the time of such failure, file such award, together with the submission or arbitration bond, in the court named in the submission.”

Judgment upon award.—Section 7 declares that

“The party filing such award may, at the next term after such filing, by giving four days’ notice of his intention to the opposite party, and if no legal exceptions are taken to such award or other proceedings, have final judgment thereon, as on the verdict of a jury, for the sum specified in said award to be due, together with the costs of arbitration and of the court; and execution may issue therefor, as in other cases.”

This section applies as well to arbitrations in matters not in suit, under section 16, *post*, as to matters in suits pending under section 1, *ante*.⁴ A judgment will not be entered upon an award unless it is made in pursuance of the statute.⁵ But

¹ *Hayward v. Harmon*, 17 Ill. 477; *McDonald v. Arnout*, 14 Ill. 58; *Stearns v. Cope*, 109 Ill. 340.

² *Whetstone v. Thomas*, 25 Ill. 361; *McNear v. Bailey*, 18 Mo. 251; *Varney v. Brewster*, 14 N. H. 49.

³ *Ott v. Schroepfel*, 5 N. Y. 482; *McNear v. Bailey*, 18 Me. 251; *Bun-*

tain v. Curtis, 27 Ill. 374; *Busse v. Agnew*, 10 Bradw. 527.

⁴ *F. L. Co. v. Ragsdale*, 12 Bradw. 441.

⁵ *Weing v. Dopler*, 17 Ill. 111; *Lowe v. Nolte*, 15 Ill. 368; *Cook v. Schroeder*, 55 Ill. 530; *Martine v. Harvey*, 12 Bradw. 587; *Smith v. Douglas*, 16 Ill. 34.

the court will enter judgment on a common law award by the consent of the parties.¹

Jurisdiction to enter a judgment upon an award of arbitrators, being wholly given by statute, the proceedings must conform strictly to the requirements of the statute, or the court will have no jurisdiction or authority to enter judgment upon the award.²

Where the parties to a suit have submitted the matters involved to arbitrators, and stipulated that their award shall be entered as the finding of the court, the complainant can not dismiss the suit after a motion to set aside the award has been overruled.³

Enforcement of award.—Section 8 of the act relating to arbitrations and awards, provides that

“When the award requires the performance of any act other than the payment of money, the court rendering such judgment shall enforce the same by rule, and the party refusing or neglecting to comply with such rule, may be proceeded against by attachment or otherwise, as for a contempt.”

This section applies to arbitrations under the statute of controversies not in suit. When anything is to be done other than the payment of money, as where the submission is of all matters in dispute with regard to a right of way of a railroad company, the award could not be one on which a judgment could properly be rendered for a sum of money only. The payment of money and conveyance of the right of way in such a case, would be properly made concurrent acts; but the enforcement as a statutory award can only be compelled under the above section 8.⁴

Award, when set aside.—It is provided in section 9 of the same act, that

“If any legal defects appear in the award or other proceedings, or if it shall be made to appear on oath or affirmation, that said award was obtained by fraud, corruption or other undue

¹ *Morey v. Mower Co.*, 90 Ill. 307.

⁴ *R. R. Co. v. Alfred*, 3 Bradw.

² *Martine v. Harvey*, 12 Bradw. 587.

511; *R. R. Co. v. R. R. Co.*, 66 Ill. 174.

³ *Ives v. Ashelby*, 26 Ill. App. 244.

means, or that such arbitrators misbehaved, said court may set aside such award."

This section applies to arbitrations under the statute, whether in cases pending, or disputes not in suit.¹

Mere error of arbitrators as to the law or facts, is not ground for setting aside the award;² but if the submission requires an award to be an entirety, an award which is too narrow or too broad, will bind neither party.³

The award of two or three arbitrators is void, if the third arbitrator has no notice to act in the matter; or if it purports to be the award of three, when in point of fact, it was only the award of two of them.⁴

Fraud.—An award obtained by the fraud of the party,⁵ or by reason of fraud, corruption, partiality or gross misconduct on the part of the arbitrators, will be set aside by a court of equity, where courts of law do not possess the power, as being against equity and good conscience,⁶ unless the party applying therefor has done that which amounts to a waiver.⁷ If there has been no waiver, the award may be set aside upon those grounds, even though the parties agreed in the submission that there should be no exception or appeal.⁸

In order to impeach an award upon the ground of fraud, corruption or misconduct of an arbitrator, the proof must be clear and conclusive and not depend upon the naked assertion of the other party, or upon mere suspicion.⁹ But it may be inferred, where the award is so manifestly unjust as irresisti-

¹ See sections 16-18, *post*.

² *Pottle v. McWorter*, 13 Ill. 454; *Ross v. Watt*, 16 Ill. 99; *Merrett v. Merrett*, 11 Ill. 565; *Sherfy v. Graham*, 72 Ill. 158; *Buntain v. Curtis*, 27 Ill. 374; *Tucker v. Page*, 69 Ill. 179; *Whetstone v. Thomas*, 25 Ill. 361.

³ *Alfred v. R. R. Co.*, 92 Ill. 609; *Glade v. Schmidt*, 20 Bradw. 157; *Stearns v. Cope*, 109 Ill. 340.

⁴ *Bannister v. Read*, 1 Gilm. 92; see *Ins. Ass'n v. Briggs*, 22 Ill. App. 107.

⁵ *Bulkley v. Starr*, 2 Day 552; *Spurck v. Crook*, 19 Ill. 415.

⁶ *Baird v. Crutchfield*, 6 Humph. 171; *Rand v. Redington*, 13 N. H. 72; *Conway v. Duncan*, 28 Ohio 102; *Towing Co. v. Taylor*, 126 Ill. 250.

⁷ *Noyes v. Gould*, 57 N. H. 20; *Seaton v. Kendall*, 61 Ill. App. 289.

⁸ *Speer v. Bidwell*, 44 Penn. 23.

⁹ *Coryell v. Coryell*, 1 N. J. Law 388; *Hardeman v. Burge*, 10 Yerg. 202; *Hamilton v. Wort*, 3 Blackf. 68; *Callant v. Downey*, 2 J. J. Marsh. 346.

bly to lead to the conclusion, as, where the amount awarded is nearly three times as much as was claimed.¹ To warrant the court in setting aside an award upon the ground of fraud or corruption upon the part of the arbitrators, upon the ground of excessive damages, the amount awarded must be so grossly extravagant as to negative the idea that it expresses the honest judgment of the arbitrators.²

If an arbitrator was intoxicated during the hearing, the award will be set aside without any other proof, as that is evidence of such misconduct as ought to vitiate his action upon the matters between the parties.³

Where there is no evidence of partiality, an award will not be set aside because one of the arbitrators is a creditor of one of the parties;⁴ or had previously expressed an opinion upon the matters in dispute.⁵ And it is no ground for setting aside an award of an arbitrator, that he had formerly been counsel in another suit for the party in whose favor he found, although this fact was not known or communicated to the party against whom the award was made, or to his counsel, in the absence of evidence that the fact was intentionally concealed.⁶

Private conversations concerning the controversy between a party, his agent or attorney, and one of the three arbitrators, after the selection of the latter, is a ground in chancery for setting aside the award;⁷ although a conversation with a third party is held to be no ground for disturbing the award; but an arbitrator, after being chosen, should not listen to statements as to matters involved, except when given in evidence.⁸

It is the duty of an arbitrator, as of a juror or judge, to keep himself, as far as possible, free from any influence that

¹ *R. R. Co. v. Moore*, 28 Geo. 398; *Rand v. Redington*, 13 N. H. 72.

² *Burchell v. Marsh*, 17 How. (U. S.) 344; *Rudd v. Jones*, 4 Dana 229. *Van Cortlandt v. Underhill*, 17 John. 405.

³ *Smith v. Smith*, 28 Ill. 56.

⁴ *Fischer v. Towner*, 14 Comm.

26; *Wallis v. Carpenter*, 13 Allen. 19.

⁵ *Graves v. Fisher*, 5 Me. 69; *For v. Hazelton*, 10 Pick. 275.

⁶ *Goodrich v. Hulbert*, 123 Mass. 190.

⁷ *Mosier v. Shear*, 102 Ill. 169.

⁸ *Shear v. Mosier*, 8 Bradw. 119; *Strong v. Strong*, 7 Cush. 560; *Johnson v. Holyoke*, 107 Mass. 473.

would tend to impair his impartiality or expose him to the suspicion of prejudice.¹ But as a longer interval of time usually occurs between his selection and his service, subjecting him to greater exposure, and not being specially advised of his duty, and restrained in his conduct by the direction and authority of a court, greater latitude is to be expected and tolerated in his case, than in that of a juror.²

It is held to be sufficient to authorize a court of equity to enjoin a suit at law upon an award, and set aside an award, that one of the parties in interest made a statement to one of the arbitrators, in the absence of the adverse party, designed and having a tendency to improperly affect his decision as an arbitrator, without showing that such statement, in fact, produced any harmful result to the other party. And a party to an arbitration, who, by overt acts, attempts to corrupt or improperly influence the arbitrators, or any one of them, to make an award in his favor, will not be heard to say that he was impotent to accomplish what he sought, and to raise an issue thereupon.³

Mistake.—A common law award can not be set aside for mistake, either of law or facts, unless the error is so palpable as to show that injustice has been done, as they are the judges of both. But under statutory submissions, it is held that an award may be set aside for mistakes as to the facts, when such mistake clearly appears upon the face of the award;⁴ and the arbitrators were evidently misled or deceived thereby.⁵

The instances are rare, in which an award will be set aside for mistake of facts.⁶ And an award will only be set aside

¹ *Shear v. Mosier*, 8 Bradw. 119; *Morville v. Tract Soc.*, 123 Mass. 139; *Gas Co. v. City*, 5 W. Va. 492; see *Haurroth v. Peters*, 50 Ill. App. 366.

² *Shear v. Mosier*, 8 Bradw. 119; *Jones v. Miller*, 1 Dallas 205; *Graves v. Fisher*, 15 Maine 54; *Gas Co. v. City*, 5 West Va. 492.

³ *Catlett v. Dougherty*, 114 Ill. 568; *Mosier v. Shear*, 102 Ill. 169; *Strong v. Strong*, 9 Cush. 574; *Cut-*

ler v. Wall, 9 R. I. 264; *Sisk v. Garey*, 27 Md. 401; *Morse on Arb. and Award*, 534; 2 Story's Eq., Sec. 1452a.

⁴ *Conger v. James*, 2 Swan. 213; *Halstead v. Seaman*, 52 How. (N. Y.) 415; *Fudicker v. Ins. Co.*, 62 N. Y. 392.

⁵ *Roloson v. Carson*, 8 Md. 208; 6 Wait's Ac. and Def. 549.

⁶ *Pulliam v. Pensoneau*, 33 Ill. 374; *Spurck v. Cook*, 19 Ill. 425;

upon the ground of a mistake as to the law, when the submission requires that they shall decide according to law, or it is evident from their award that they intended so to decide, but acted under a clear mistake as to what the law was.¹

Of award prepared by one of the attorneys.—The fact that an award of arbitrators is prepared by the attorney of the successful party, affords no ground for setting it aside where it fully expresses the findings and conclusions of the arbitrators.²

Signing of the award.—It is not necessary that the award should be signed at the same time and place;³ nor that the parties should be present when signed.⁴

When court may correct award.—Section 10 of the act relating to arbitration and awards provides that

“If there be any evident miscalculation or misdescription, or if the arbitrators shall appear to have awarded upon matters not submitted to them, not affecting the merits of the decision upon the matters submitted, or where the award shall be imperfect in some matters of form, not affecting the merits of the controversy, and where such errors and defects, if in a verdict, could have been lawfully amended or disregarded by the court, any party aggrieved may move the court to modify or correct such award.”

This section does not give the court equitable power to reform an award. It is intended to give the court authority to correct awards in matters of form merely.⁵

There is no doubt of the power of a court of equity to correct a mistake in an award where it is the mutual mistake of all the arbitrators. The award is sometimes treated as the judgment of a tribunal of the parties' own choosing, and sometimes as an agreement which they have authorized the arbitrators to make for them. Regarding it in the latter

Water Co. v. Gray, 6 Metc. 131;
Learned v. Bellows, 8 Vt. 79; *McCalmont v. Whittaker*, 3 Rawle, 84;
2 Greenl. on Ev., Sec. 78.

¹ *Crissman v. Crissman*, 5 Ired. 498; *Muldrow v. Norris*, 2 Cal. 74;
Johnson v. Noble, 13 N. H. 286;
Johns v. Stevens, 3 Vt. 308.

² *Steere v. Brownell*, 113 Ill. 415;
see *Kilderhouse v. Hall*, 116 Ill. 147.

³ *Blodgett v. Prince*, 109 Mass. 44.

⁴ *Roloson v. Carson*, 8 Md. 208;
Saunders v. Heaton, 12 Ind. 20;
Steere v. Brownell, 113 Ill. 415.

⁵ *Howell v. Howell*, 26 Ill. 460; see
Farr v. Johnson, 25 Ill. 522.

character, courts of equity have assumed to correct a mistake in an award where it is mutual, was acquiesced in by all the arbitrators, and where the award as made is not their award, but if corrected would be the award of all of them.¹

If an award is within the submission, and contains the honest decision of the arbitrators after a fair hearing, a court of equity will not set it aside for error in law or fact.²

When motion to set aside, or modify, must be made.—It is required by section 11 of the same statute that

“Application to set aside, modify or amend such award, as provided in the two preceding sections, must be made before the entry of final judgment on such award; *provided*, nothing herein contained shall be so construed as to deprive courts of chancery of their jurisdiction, as in other cases.”

Error and appeals.—Section 12 of the same statute authorizes—

“Writs of error and appeals may be taken from any decision of the court by the party deeming himself aggrieved, as in other cases; and if the supreme court shall remand the case, such further proceeding shall be had as the nature of the case may require.”

There is no appeal from or review of an award within the jurisdiction of the arbitrators, except for fraud, partiality or misconduct.³

Compensation of arbitrators—Fees of witnesses.—Section 13 of the same statute provides that

“Each arbitrator shall be allowed, for every day’s attendance to the business of his appointment, \$2, to be paid in the first instance by the party in whose favor the award shall be made, but to be recovered of the other party with the other costs of suit if the award or final decision shall entitle the prevailing party to recover costs. Witnesses shall receive the same fees for attendance at arbitrations as shall be allowed

¹ *Einsmeyer v. Sauter*, 77 Ill. 515; *Stone v. Atwood*, 28 Ill. 30; *Ballance v. Underhill*, 3 Scam. 453; *Pulliam v. Pensoneau*, 33 Ill. 375; see *Toby v. Rowe*, 18 Bradw. 293; *Catlett v. Dougherty*, 114 Ill. 568.

² *Burchell v. Marsh*, 58 U. S. (17 How.) 344.

³ *Sherfy v. Graham*, 72 Ill. 158; *Phelps v. Dolan*, 75 Ill. 90; see *Ven Winkle v. Beck*, 2 Scam. 488; *Rogers v. Holden*, 13 Ill. 293.

them in the circuit courts. Sheriffs, constables, clerks and justices of the peace shall be entitled to the same fees for services performed, in relation to any arbitration, as shall be allowed by law for the like services in their respective courts."

Arbitrators may be compelled to duty.—Section 14 of the same statute declares that "arbitrators may be compelled by order of the court in which any cause submitted to them shall be pending, to proceed to a hearing thereof, and to make a report without unnecessary delay."

Record of reference.—It is provided by section 15 of the same statute that "when any cause pending in any court shall be referred, as herein provided, an entry of such reference shall be made on the record, and day shall be given to the parties, from time to time, until the arbitrators report, or they may be thereof discharged, on filing such report."

In matters not in suit.—Section 16 of the statute relating to arbitrations and awards provides that

"All persons having a requisite legal capacity may, by an instrument in writing, to be signed and sealed by them, submit to one or more arbitrators any controversy existing between them, not in suit; and may, in such submission, agree that a judgment of any court of record, competent to have jurisdiction of the subject-matter to be named in such instrument, shall be rendered upon the award made pursuant to such submission."

The first section of the act, as we have seen *supra*, relates exclusively to *pending suits*, in which class of cases the court has authority to enter an order submitting the matter involved to three arbitrators. Section sixteen, above quoted, relates exclusively to controversies *not in suit*. Under section one, the court has no authority to order a submission to one arbitrator, or to any greater or less number than three; nor has the court authority to make an order of submission in respect to any matter not involved in a suit pending. Under section sixteen, parties may submit controversies between them to any number of arbitrators mutually agreed upon, but to entitle them to have a judgment rendered upon the award, it must affirmatively appear that the submission was of matters not in suit. Unless this appears in the articles of submission, the

court is without jurisdiction to enter judgment and the party is left to his remedy independent of the statute.¹ The jurisdiction of the court in such cases is conferred exclusively by the statute, and the statute must be strictly construed.² But the statute does not abridge the common law right of parties to adjust their differences by arbitration.³

Proceedings under section 16.—Section 17 of the same statute provides that “upon a submission under the foregoing section, the arbitrators shall take the same oath, and may compel the attendance of witnesses, and shall proceed in the same manner as if the submission had been made in a cause of pleading.”

A provision in a lease for appointment of persons to fix the rent to be thereafter paid, is not a submission to arbitration so as to require notice to the parties of the time and place of the meeting of the appraisers.⁴

Award under section 16.—It is provided in section 18 that “the award and instrument of submission may be filed in a court of record of competent jurisdiction, within the same time and upon like conditions, and notice and proceedings had thereunder, and judgment entered, the same as if the award had been made in a suit pending in such court.”

II. COMMON LAW SUBMISSION.

Common law submissions differ from statutory submissions, in that they are dependent entirely upon the agreement of the parties, and have no validity if either withdraws his assent before an award is made, and in that the award merely has the force of a debt in favor of the person in whose favor it is made, against the other party, and can only be enforced by an action at law thereon, or by application to a court

¹ *Martine v. Harvey*, 12 Brad. 587; *Lowe v. Nolte*, 15 Ill. 368.

² *Lowe v. Nolte*, 15 Ill. 368; *Hamilton v. Hamilton*, 27 Ill. 158; *Ran-kin v. Rankin*, 36 Ill. 293; *Martine v. Harvey*, 12 Bradw. 587.

³ *Smith v. Douglas*, 16 Ill. 34; see *Cornwall v. March*, Breese 295; *R. R. Co. v. Alfred*, 3 Bradw. 511.

⁴ *Norton v. Gale*, 95 Ill. 533; *Stose v. Heissler*, 120 Ill. 433; *Pearson v. Sanderson*, 128 Ill. 88; S. C., 28 Ill. App. 571.

⁵ Rev. Stat. (1893), 165; Rev. Stat. (1895), 168; 1 Starr & Curtis 306; *Seaton v. Kendall*, 61 Ill. App. 289.

of chancery for a specific performance. But, while a common law award is not a judgment in the strict sense of the word, and can not be enforced as such, yet it possesses many of the attributes of a judgment, and in many cases reaches further, and more effectually settles controversies between parties than would a judgment of a court of law. A court of law can only conclude the parties as to matters set forth in the declaration under which the judgment is rendered, and only their legal rights, leaving all equitable rights still open for adjustment. But an award reaches out and embraces and settles *all* the rights of the parties as to the matters submitted, *both* legal and equitable, and forever settles all controversies pertaining thereto, so that no other human tribunal, as between the parties thereto, and their privies, can ever re-adjudicate them, unless the award is first set aside upon the ground of fraud, misconduct or mistake.'

How submitted.—At the common law, a submission may be made either in writing or by parol, by the agreement of the parties, and an award made in pursuance of a parol submission is as binding upon the parties as one made in writing.² But where a writing is required to pass the thing in contest, such as disputes concerning real estate, the submission and award must be in writing; in all other cases a verbal submission and award will effectually conclude the parties.³ But even if the rule were otherwise, relative to submissions relating to land, such submission would be void under the statute of frauds.⁴

It is held that matters relating to the *price* of land may be submitted by parol;⁵ and it has been held in Pennsylvania, that a parol submission as to a boundary line is valid.⁶ And so is

¹ *Rogers v. Holden*, 13 Ill. 293; *Hadaway v. Kelly*, 78 Ill. 286; *Ger-rish v. Ayres*, 3 Scam. 245; *Winkler v. Beck*, 2 Scam. 488; *Kimball v. Walker*, 30 Ill. 482; *Tucker v. Page*, 69 Ill. 180; 6 Wait's Ac. & Def. 506.

² *Phelps v. Dolan*, 75 Ill. 90; *Koons v. Hollingsworth*, 97 Ill. 52.

³ *Smith v. Douglas*, 16 Ill. 34; *Valentine v. Valentine*, 2 Barb. Ch. 430;

Titus v. Scantling, 4 Blackf. 89; *Shockley v. Glasford*, 6 Dana 90; *Martin v. Chapman*, 1 Ala. 278; *French v. New*, 28 N. Y. 147.

⁴ *Stark v. Cannaday*, 3 Litt. 399; *Philbrick v. Preble*, 18 Me. 255; *Norton v. Gale*, 95 Ill. 533.

⁵ *Davey v. Farr*, 7 Cranch (U. S.) 172.

⁶ *Bowen v. Cooper*, 7 Watts 11;

a parol submission as to damages growing out of a contract relating to land,¹ if the contract itself is valid. Where the submission is by parol, it is material to prove, not only that both parties promised to abide by the award, but that the promises were concurrent and mutual, for otherwise each promise is but *nudum pactum*.²

Revocation.—All common law submissions to arbitration, whether by parol, in writing, or by deeds, are revocable, even though the parties expressly agree that they shall not be. No stipulation in such agreements will be sustained, either at law or in equity, which deprives parties from having recourse to courts of justice to settle their differences, if they so elect; consequently, independent of some statutory restrictions, an agreement of this character can not be made irrevocable;³ and this right may be exercised at any time before the award is actually made;⁴ and by such revocation annul all contracts relative to the submission, and leave the other party to rest entirely upon the penalty of the bond, if there is one, or their remedy upon the case, if no bond was entered into.⁵

The institution of a suit by one party before the award has been made, the cause of action being the subject-matter of the arbitration, will operate to revoke, by implication, the agreement to arbitrate.⁶

After an award is made and published, neither party can revoke the submission without the consent of the other.⁷ If the submission is by parol, it may be revoked by parol, but

see also *Orr v. Hadley*, 36 N. H. 875; *Stewart v. Cass*, 16 Vt. 663.

¹ *Carson v. Earlywine*, 14 Ind. 256.

² *Ingraham v. Whitmore*, 75 Ill. 24; *Keep v. Goodrich*, 12 Johns. 397; 2 Greenl. Ev., Sec. 73; *Kingston v. Phelps*, Peake's Cases 227.

³ *Frink v. Ryan*, 3 Scam. 322; *Marsh v. Packer*, 20 Vt. 198; *Davis v. Maxwell*, 27 Geo. 368; *Tobey v. County*, 3 Story (U. S.) 800.

⁴ *Leonard v. House*, 15 Geo. 473; *Allen v. Watson*, 16 John. 205; *Bray v. English*, 1 Conn. 498; *Aspinwall v. Tousey*, 2 Tyler (Vt.) 328; *Paulsen*

v. Manski, 126 Ill. 72, same case, 24 Ill. App. 105.

⁵ *Pond v. Harris*, 113 Mass. 114; *Aspinwall v. Tousey*, 2 Tyler (Vt.) 328; *Miller v. Canal Co.*, 53 Barb. 590; *Craftsburg v. Hill*, 28 Vt. 763; *Brown v. Leavitt*, 26 Me. 251.

⁶ *Peters v. Craig*, 6 Dana 307; *Morse on Arbitration*, 236; *Paulsen v. Manski*, 24 Ill. App. 105; same case, 126 Ill. 72.

⁷ *Marsh v. Packer*, 20 Vt. 198; *Clement v. Hadlock*, 13 N. H. 185; *Eastman v. Armstrong*, 26 Ill. 216.

the party must give distinct notice of revocation.¹ A submission in writing can only be revoked in writing;² and where the submission is under seal, it has been held that the revocation must also be under seal;³ and it has been held that a parol agreement between the parties to waive and abandon an award, made under a submission under seal, can not be pleaded in bar to an action on the bond.⁴

If the submission is made by one party on one side, and two on the other, *one* of the two can not revoke it without the assent of the other.⁵

The death of one of the parties to the submission operates as a revocation, *per se*, unless otherwise expressly provided in the articles of submission.⁶ If either of the arbitrators refuses to act, the submission becomes abortive, and both parties are released therefrom,⁷ unless provision is made for such a contingency by agreeing upon a substitute.⁸

Who may be arbitrators.—The parties *knowing the facts* may submit their differences to any person, whether he is interested in the matters involved,⁹ or is related to one of the parties, and the award will be binding upon them; and where knowledge of such facts comes to a party after the submission is made, but while there is still power to revoke, if he neglects to revoke the submission, but permits the award to be made, he is treated as having waived the objection, and is

¹ 1 Bac. Abr. 306; *Keyes v. Fulton*, 42 Vt. 159.

² *McFarlane v. Cushman*, 21 Wis. 401; *Mullins v. Arnold*, 4 Sneed 262; *Evans v. Cheek*, 3 Hayw. 42; *Antwerp v. Stewart*, 8 Johns. 125; but see *Paulsen v. Manski*, 24 Ill. App. 105.

³ *Brown v. Leavitt*, 26 Me. 251; *Wallis v. Carpenter*, 13 Allen 19.

⁴ *Braddick v. Thompson*, 8 East 344.

⁵ *Robertson v. McNeil*, 12 Wend. 578; 1 Bac. Abr. 308.

⁶ *McIntire v. Morris*, 14 Wend. 90; *Power v. Power*, 7 Watts (Pa.) 205;

Bailey v. Stewart, 3 W. & S. 560; *Dexter v. Young*, 40 N. H. 130; *Whitfield v. Whitfield*, 8 Ired. L. 163; *Tyson v. Robinson*, 3 Ired. 333; *Marseilles v. Kenton*, 17 Pa. St. 238.

⁷ *Wooley v. Clark*, 2 D. & R. 158; *Blundell v. Brettargh*, 17 Ves. Jr. 242; see *Church v. Hearson*, 41 Ill. App. 89.

⁸ *Wilson v. Cross*, 7 Watts (Penn.) 495; *Binsse v. Wood*, 47 Barb. 624; *Woodbury v. Procter*, 9 Gray 18.

⁹ *Nav. Co. v. Fenlon*, 4 W. & S. (Penn.) 205; see *Ben. Ass'n v. Robinson*, 147 Ill. 159.

bound by the award.¹ But if the facts were unknown to one of the parties, the objection would be fatal to the award.²

General powers and duties.—There is a broad distinction between the powers of arbitrators under a common law submission, and those appointed under the statute; and this distinction must not be overlooked. In a common law submission, the arbitrators are not required to be sworn, nor are they bound to conform to the rules of law or equity in the admission of evidence; or in arriving at the result. So long as they keep within the limits of the submission, and do not act corruptly, and there is no fraud or evident mistake, their decision is conclusive.³ They have the power to decide upon both the law and the facts and neither party can complain that they have made a mistake in either respect.⁴ They are at liberty to decide according to equity and good conscience, irrespective of the rules of law;⁵ and in a case where an action of slander was submitted, and the arbitrators awarded damages for words not actionable, the court refused to interfere;⁶ and the rule generally is, both at law and in equity, that arbitrators are clothed with authority to decide the questions submitted to them, and that, if their authority has been fairly and impartially exercised, their decision can not be revised. To warrant the court in reviewing their action upon the merits, something more than error of law or of judgment as to the facts must be established. It must appear either that they have transcended their powers, or have committed a mistake so gross and palpable as to evince partiality, corruption or grave misconduct,⁷ resulting in an injury to the party seeking

¹ *Davis v. Forshee*, 35 Al. 107.

² *Brown v. Leavitt*, 26 Me. 251;
Hicks v. McDonnell, 99 Mass. 459.

³ *Brown v. Bellows*, 4 Pick. 179;
Todd v. Barlow, 2 Johns. Ch. 551;
Golden v. Mueller, 22 Ill. App. 527.

⁴ *Mitchell v. DeSchamps*, 13 Rich. 9; *R. R. Co. v. Scruggs*, 50 Miss. 285;
Mickles v. Thayer, 14 Allen 114; *Mfg. Co. v. Fox*, 18 Maine, 117; *Crabtree v. Green*, 8 Geo. 8; *Conrad v. Johnson*, 20 Ind. 421.

⁵ *Bliss v. Rollins*, 6 Vt. 529.

⁶ *Shepard v. Watrous*, 3 Cal. (N. Y.) 166.

⁷ *Wynn v. Bellas*, 34 Penn. 160; *Perkins v. Giles*, 53 Barb. 342; *Wade v. Powell*, 31 Ga. 1; *Mulder v. Cravat*, 2 Bay (S. C.) 370; *Bennett v. Russell*, 34 Mo. 524; *Goldsmith v. Tilley* 1 H. & J. (Md.) 361; *Bell v. Price*, 22 N. J. L. 578; *Wheatley v. Martin*, 6 Leigh (Va.) 62; *Ashley v. Thomas*, 17 Texas 220; *Brown v. Green*, 7

to avoid their action;¹ as a party benefited by a mistake has no reason to complain.²

Recommitting award.—Under a common law submission, the courts have no power to recommit an award to the arbitrators for correction or reconsideration, or for any purpose. When arbitrators have once executed their powers, by making and returning an award, their powers expire and are forever gone, without the express consent of both parties to recommit the matters in contest to them again.³

The right of the court to remit a cause decided by arbitrators to them again, without the consent of the parties, has no more foundation than the right to send a cause to arbitration in the first instance, without their consent. Great injustice might be done in such cases, as in the interval, one party may have discovered that his rights were not safe with the arbitrators—that they were prejudiced, corrupt or incompetent.⁴

When an award has been set aside, the court will proceed with the case as if it had never been referred.⁵

III. FORMS FOR SUBMISSIONS TO ARBITRATORS.

No. 310. *Agreement to submit, suit pending.*

In the — Circuit Court.

— Term, A. D. 18—.

A. B. }
vs. }
C. D. } In an action of —.

Know all men by these presents: That we, the above named plaintiff and defendant, do hereby mutually agree to submit the matter involved in the above entitled cause to the decision and award (*) of E. F., G. H. and

Conn. 536; *Bridgman v. Bridgman*, 23 Mo. 272; *Ins. Co. v. Hamilton*, 48 Ill. App. 593.

¹ *Daniels v. Willis*, 7 Minn. 374; *Pomeroy v. Kibbee*, 2 Root (Conn.) 92; *Tomlinson v. Hammond*, 8 Iowa 40.

² *Galvin v. Thompson*, 13 Me. 367; *Lyman v. Arms*, 5 Pick. 213; *Macon v. Crump*, 1 Call (Va.) 575; *Bradshaw v. Docks*, 12 Q. B. 562; 6 Wait's Ac. and Defs. 519.

³ Russell on Arbitrators, Sec. 8, p. 461; *Fitzgerald v. Fitzgerald*, Hardin (Ky.) 228; *French v. Mosely*, 1 Litt. (Ky.) 248; *Lansdale v. Kendall*, 4 Dana (Ky.) 613; *Aldrich v. Jessiman*, 8 N. H. 516; *R. R. Co. v. Bradley*, 7 Ind. 53; *Doke v. James*, 4 Comst. 575; *Smith v. Smith*, 28 Ill. 59.

⁴ *Smith v. Smith*, 28 Ill. 59.

⁵ *Smith v. Smith*, 28 Ill. 59.

J. K., as arbitrators, pursuant to section 1, chapter 10 of the Revised Statutes of this State.

Dated this — of —, A. D. 18—.

A. B., Plaintiff,
C. D., Defendant.

No. 311. Agreement to submit suit pending, each party selecting one arbitrator, and the court the third.

(Commence as in the last form to the^(*) and then proceed:) of E. F. and G. H., selected by said parties, and agree that the court may name the third arbitrator, pursuant to section 1 of chapter 10 of the Revised Statutes of this State.

Dated, etc.

A. B., Plaintiff,
C. D., Defendant.

No. 312. Order referring suit pending to arbitrators.

(Title of cause.)

Upon the agreement of the parties hereto, it is ordered that this cause and the matters involved therein, be, and the same is hereby submitted to the decision of E. F., G. H. and J. K., as arbitrators, agreed upon by the parties respectively, in pursuance to the statute in such case made and provided.

No. 313. Oath of arbitrators.

(Venue, and title of cause as in No. 310, ante.)

We, the undersigned, to whom the matter in controversy involved in the above entitled cause was submitted by the court, as arbitrators, each of us, on oath state that we, and each of us, will faithfully hear, examine and determine the cause, according to the principles of equity and justice; and will make a just and true award, according to the best of our understanding, so help us God.

E. F.
G. H.
J. K.

Subscribed and sworn, etc.

No. 314. Award in suit pending.

(Venue, and title of cause as in No. 310; ante.)

To all to whom these presents shall come, or concern, be it known and published:

That we, the undersigned, to whom the matters involved in the above entitled cause were submitted, by the order of the court, therein, as arbitrators, do declare and publish that we, after being each sworn, as required by the statute, to faithfully hear, examine and determine the said cause, according to the principles of equity and justice, and to make a just and true award according to the best of our understanding, and having appointed a place and time for the hearing of said cause, and having given

the said parties, respectively, notice of the place and time of such hearing, and having been attended by said parties, or their respective attorneys, and having heard the proofs and allegations of the parties, and examined the matters in controversy in said cause, and being fully advised in relation thereto, do make and publish this, our award, in writing.

That, etc. (*Here insert the matters determined and awarded.*)

In witness whereof we have hereunto subscribed our names, this — day of —, A. D. 18—.

E. F., G. H. and J. K.,
Arbitrators.

No. 315. Agreement of submission of a controversy not in suit. (Statutory under section 16.)

Know all men by these presents: That whereas a controversy is now existing and pending, but not in suit, between us, the undersigned, in relation to (*here state the nature of the controversy.*)

That we, the undersigned, do hereby submit to E. F., of, etc., (*or E. F., G. H. and J. K., of, etc.,*) as arbitrator, (*or arbitrators,*) the said matter of controversy existing between us; and we do hereby further agree that a judgment of any court of record, competent to have jurisdiction of the subject-matter of said controversy, may be rendered upon the award made pursuant to this submission, in pursuance of the statute in such case made and provided.

Dated, etc.

A. B.
C. D.

No. 316. Award in a controversy not in suit. (Statutory in section 16.)

To all to whom these presents shall come, or may concern, be it known and published:

That I, E. F., (*or we, E. F., G. H. and J. K.,*) arbitrator, (*or arbitrators*) to whom the matter in controversy existing between A. B. and C. D., not in suit, was submitted, do declare and publish, that I, (*or we*) after being sworn, as required by the statute, to faithfully hear, examine and determine the said cause, according to the principles of equity and justice, and to make a just and true award according to the best of my (*or our*) understanding, and having appointed a place and time for the hearing of said cause, and having given the said parties, respectively, notice of the place and time of such hearing, and having been attended by said parties, or their respective attorneys, and having heard the proofs and allegations of the parties, and having examined the matters in controversy in said cause, and being fully advised in relation thereto, do make and publish this, my (*or our*) award, in writing, that is to say:

That, etc. (*Here insert the matters determined and awarded.*)

In witness whereof, I (*or we*) have hereunto subscribed my name, (*or our names*) this — day of —, A. D. 18 —.

(*Signed by arbitrator or arbitrators.*)

*No. 317. General agreement for submission of all matters in controversy.
(Common law.)*

Know all men by these presents: That whereas differences and controversies now exist and are pending between the undersigned, A. B. of, etc, and C. D. of, etc., in relation to divers subjects of controversy and dispute;

Therefore, we, the undersigned, do hereby submit said differences to the arbitrament of E. F., G. H. and J. K., or to any two of them, to arbitrate, determine and award, of and concerning all manner of actions, suits, bills, bonds, specialties, controversies, trespasses, damages, debts, claims, demands, and all and every other subject of differences whatsoever, at any time heretofore had, possessed, instituted, prosecuted, made, began, pending, existing, done, or suffered to be done, committed, or pending, by and between us, directly or indirectly.

That the said award shall be made in writing, under the hands of the said named arbitrators, or any two of them, ready to be delivered to us, the said parties, or such of us as may desire the same, on or before, etc.

That the said award, when made, shall in all things by us, and each of us, be well and faithfully kept, observed and performed.

Witness our hands (*and seals*) this — day of — A. D. 18 —.

A. B. [SEAL.]

C. D. [SEAL.]

*No. 318. Agreement of submission of particular matter in controversy.
(Common law.)*

Know all men by these presents: That whereas divers disputes and controversies have arisen and are now depending between the undersigned, A. B. of, etc., and C. D. of, etc., touching and concerning (*state the matter in controversy.*)

That for the determination and ending of the said controversies, it is hereby mutually agreed by and between the said parties, that all matters in controversy between them, touching and concerning all and every matter and thing above mentioned and specified, shall be referred and submitted to the arbitrament and determination of E. F. (*or E. F., G. H. and J. K., or any two of them.*)

That the said award shall be made in writing, under the hand of said arbitrator (*or under the hands of said arbitrators, or any two of them.*) ready to be delivered to said parties, or such of them as shall desire the same, on or before the — day of —, A. D. 18—.

That the said award when so made shall in all things by us and each of us be well and faithfully kept, observed and performed.

(*To be signed by the parties.*)

The parties may agree that each shall give a bond to the other for the faithful compliance with the award of the arbitrators. In such case the following form of such bond may be used:

No. 319. Arbitration bond, to be given by each party to the other.

Know all men by these presents: That I, (*A. B. or C. D.*) of, etc., am held and firmly bound unto (*C. D. or A. B.*) in the sum of — dollars, for the payment of which I bind myself, and legal representatives, by these presents.

The condition of the above obligation is such, that if the above bounden (*A. B. or C. D.*), or his legal representatives shall submit, perform, and comply with the determination and award of E. F., G. H. and J. K., the arbitrators named and selected by said parties to determine and award of and concerning (*here describe the matter submitted*), in accordance with the terms of submission agreed upon between said parties, of even date herewith, then this obligation shall be void, otherwise to be, and remain in full force and effect.

Witness my hand and seal this — day of —, A. D. 18—.

(*To be signed by the party executing the bond.*)

No. 320. Award, on common law submission, by single arbitrator.

Know all men by these presents: That by an agreement of submission, bearing date, on, etc., the matters in difference, etc., between A. B. and C. D., were by them submitted to the consideration of the undersigned, arbitrator, to hear, determine, and award concerning the same.

That by virtue of said agreement of submission, and after having given the said parties, respectively, due notice of the time and place of said hearing, and after hearing the proofs and allegations of the respective parties, and examining the subject in controversy between them, I do determine and award as follows:

That, etc. (*Here set out the matters determined and awarded.*)

Witness my hand (*and seal*) this — day of —, A. D. 18—.

E. F., [SEAL.]
Arbitrator.

No. 321. Award, on common law submission, by three, or more, or less, arbitrators.

To all to whom these presents shall come, or concern, be it known and published:

That we, E. F., G. H. and J. K., arbitrators, to whom were submitted the matters in controversy existing between A. B. and C. D., as by agreement of submission, bearing date on, etc., more fully appears.

That we, the said arbitrators, after having appointed a time and place for the hearing of said matters, and after having given due notice thereof to the respective parties, and having heard the proofs and allegations of the parties, and examined the matters in controversy submitted, do make, declare and publish the following award and determination concerning the same, to wit:

That, etc. (*Here insert the matters awarded and determined.*)

In witness whereof, we have hereunto set our hands (*and seals*) this — day of —, A. D. 18—.

E. F., G. H. and C. D., [SEALS.]
Arbitrators.

CHAPTER XX.

CONFESSION OF JUDGMENT.

In Illinois.—The statute of Illinois provides as follows: "Any person for a debt *bona fide* due, may confess judgment by himself, or attorney duly authorized, either in term or vacation, without process. Judgments entered in vacation shall have like force and effect, and from the date thereof become liens, in like manner and extent as judgments entered in term."¹

Practice.—The established practice, in Illinois, in cases of confession of judgment in courts of record, is to file a declaration on the cause of action, a warrant of attorney (usually accompanying a promissory note) with an affidavit proving it, and a plea of confession, or *cognovit*.²

The declaration.—The declaration should correspond with the nature of the action, and may be taken from the precedents already given. It is not essential, but according to the practice, to file a declaration on a confession of judgment.³

Warrant of attorney.—A warrant of attorney to confess judgment for a debt, authorizes the attorney therein named to appear for the defendant and receive a declaration in an action for the debt, and to confess the action, or suffer judgment by *nil dicit*, or otherwise, to pass.⁴

The doctrine is well settled that a power to confess a judgment must be clearly given and strictly pursued, or the judgment will not be sustained.⁵ But the rule has its reasonable

¹ 2 Starr & Curtis, 1828; Rev. Stat. (1893) 1079; Rev. Stat. (1895) 1163; see *Atwater v. Bank*, 152 Ill. 605.

² See *Roundy v. Hunt*, 24 Ill. 598; *Iglehart v. Morris*, 34 Ill. 501; *Bush v. Hanson*, 70 Ill. 480; *Stein v. Good*, 16 Ill. App. 516; *Tucker v. Gill*, 61 Ill. 236; *Martin v. Judd*, 60 Ill. 78.

³ *Russell v. Lillja*, 90 Ill. 327.

⁴ *French v. Miller*, 126 Ill. 611.

⁵ *Campbell v. Goddard*, 117 Ill. 251; *Frye v. Jones*, 78 Ill. 632; *Keith v. Kellogg*, 97 Ill. 147; *Gardner v. Bunn*, 132 Ill. 403; *Poppers v. Meager*, 33 Ill. App. 19; *Roundy v. Hunt*, 24 Ill. 598; *Tucker v. Gill*, 61 Ill. 236; *Chase v. Dana*, 44 Ill. 262; *Matzenbaugh v. Doyle*, 56 Ill. App. 343.

limitations and must not be applied with such strictness as to defeat the obvious intention of the party granting the power.¹

Proof of the execution of the warrant of attorney is jurisdictional, and can not be dispensed with. Where the confession is taken in vacation, an affidavit of the execution must be filed.² The warrant of attorney is usually attached to the note, or other evidence of debt, upon which the confession is to be taken. Although it is usual to affix a seal to the warrant of attorney, it is not necessary to do so.³

The proof or the warrant, etc., when the judgment is confessed in open court, may be made orally, but it is usual and preferable even in term, and necessary in vacation, to make such proof by affidavit, which may be as follows:

No. 322. Proof of warrant of attorney, etc.

STATE OF ILLINOIS, }
County of ——— } sct.

E. F. of, etc., makes oath and says, that he knows C. D., whose name is subscribed to the promissory note and warrant of attorney hereto annexed, (*) and was present and saw him sign the said note and warrant, on or about the day the same bears date.

Subscribed and sworn, etc.

E. F.

If the proof is only as to the handwriting, then instead of the words following the asterisk in the above form, say :

“ And has seen him write, and is acquainted with his handwriting; and that the signatures, purporting to be his, to the said note and warrant, are in the handwriting of the said C. D.”

The cognovit.—A cognovit containing the words “I can not deny” is sufficient to authorize the clerk to enter up a judgment.⁴

Where the name of an attorney is signed to a cognovit by

¹ *Holmes v. Parker*, 125 Ill. 478.

² *Stein v. Good*, 115 Ill. 93; *Gardner v. Bunn*, 132 Ill. 403; *Durham v. Brown*, 24 Ill. 93; *Roundy v. Hunt*, 24 Ill. 598; *Thayer v. Finley*, 36 Ill. 262; *Ball v. Miller*, 38 Ill. 110; see *Iglehart v. Morris*, 34 Ill. 501; *Iglehart v. Church*, 35 Ill. 255;

Oppenheimer v. Giershafer, 54 Ill. App. 38.

³ *Truett v. Wainwright*, 4 Gilm. 411; *Tidd's Pr.* 546; see *Sloo v. Bank*, 1 Scam. 428; *Adams v. Arnold*, 86 Ill. 185.

⁴ *Lewis v. Barber*, 21 Ill. App. 638.

another person without his knowledge, the cognovit will be held valid until repudiated.¹

No. 323. Cognovit.

In the ——— court.

———— Term, 18—.

C. D. }
ats. } *Assumpsit.*
A. B. }

And the said C D., defendant, by G. H., his attorney, comes and waives service of process, etc., and confesses that the said A. B., plaintiff, on occasion of the non-performance of the several promises in the said declaration mentioned (and including the sum of ——— dollars for his reasonable attorney's fees in this behalf), has sustained damages to the amount of ——— dollars, over and above his costs by him about this suit expended. And the defendant agrees that judgment may be entered against him, in this behalf, for that amount and such costs; and that no writ of error or appeal shall be prosecuted on such judgment, nor any bill in equity exhibited to interfere in any manner with the operation thereof: And he releases all error that may intervene in the entering of such judgment, or in the issuing of execution thereon, and consents to immediate execution on such judgment.

In term time.—Where a judgment is taken in open court on warrant of attorney, the matter must be brought before the judge in person, and passed upon by him. It can only be entered by the clerk, in vacation.²

A judgment by confession can, in term time, only be entered in open court.³

Where a judgment is taken in term time it is immaterial whether the record of the same is written up or not at the time an execution is issued thereon.⁴ But an execution issued before a judgment confessed in vacation has been entered up by the clerk, is void and can not be cured by a subsequent amendment of the record.⁵

The record of a court showing a judgment by confession in open court, imports verity, and can not be contradicted by parol evidence.⁶

¹ *Hall v. Jones*, 32 Ill. 38; see *Martin v. Judd*, 60 Ill. 78.

² *Anderson v. Field*, 6 Bradw. 307.

³ *Conkling v. Ridgely*, 112 Ill. 40;
Anderson v. Field, 6 Bradw. 307.

⁴ *Weigley v. Matson*, 125 Ill. 64.

⁵ *Baker v. Barber*, 16 Ill. App. 621;
Ling v. King, 91 Ill. 571; *Cummins v. Holmes*, 109 Ill. 15.

⁶ *Weigley v. Matson*, 125 Ill. 64;
Hansen v. Schlesinger, 125 Ill. 230;
Roche v. Beldam, 119 Ill. 320.

In vacation—Power of clerk.—Where a judgment is entered in vacation by the clerk, the proper papers should be filed with him, and these become part of the record; and a bill of exceptions is not necessary to bring them before the supreme court. Judgments confessed in vacation are not judicial acts. They are merely conclusions of law, or contracts acknowledged of record.¹

The clerk has no power to enter a judgment by confession in vacation without proof being first filed of the execution of the power of attorney.²

The clerk has no power to pass upon the sufficiency of the papers so filed. If papers purporting to be in conformity to the practice are filed, the clerk must enter the judgment; and if they are insufficient to warrant the confession, the defendant may apply to the court, when in session, to have the judgment vacated; and from the decision of the court on that application the parties may prosecute a writ of error in the supreme court. Where such judgments are confessed in open court, it is presumed that the authority to confess the judgment was judicially passed upon by the court,³ at least when the record recites that due proof of the warrant was made.⁴ but a judgment confessed in vacation creates no such presumption.⁵

The confession of a judgment in vacation will not be held valid unless there is a strict compliance with the statute.⁶ Where a judgment confessed is void for want of proof of power to execute the warrant of attorney, such proof can not afterwards be received to cure the defect.⁷

¹ *Durham v. Brown*, 24 Ill. 93; *Stein v. Good*, 115 Ill. 93; *Conkling v. Ridgley*, 112 Ill. 36.

² *Gardner v. Bunn*, 132 Ill. 403, and cases there cited.

³ *Roundy v. Hunt*, 24 Ill. 598; *Iglehart v. Morris*, 34 Ill. 501; *Hall v. Jones*, 32 Ill. 38; *Martin v. Judd*, 60 Ill. 78; *Russell v. Lillja*, 90 Ill. 327.

⁴ *Iglehart v. Church*, 35 Ill. 255; *Iglehart v. Ins. Co.*, 35 Ill. 514;

Bunn v. Gardner, 18 Bradw. 94; *Campbell v. Goddard*, 117 Ill. 251.

⁵ *Durham v. Brown*, 24 Ill. 93; *Iglehart v. Ins. Co.*, 35 Ill. 514; *Bunn v. Gardner*, 18 Bradw. 94; *Campbell v. Goddard*, 117 Ill. 251; *Matzenbaugh v. Doyle*, 156 Ill. 331.

⁶ *Matzenbaugh v. Doyle*, 56 Ill. App. 343; *Stein v. Good*, 115 Ill. 93; *Whitney v. Bohlen*, 157 Ill. 571; *Gardner v. Bunn*, 132 Ill. 403.

⁷ *Bailey v. Snyder*, 61 Ill. App. 472.

When may be taken before maturity.—A judgment by confession may be entered on a note before its maturity, when the warrant of attorney authorizes the entry at “any time after the date” of the note.¹ Where the warrant authorizes the entry of judgment “at any time hereafter” it may be entered on the same day the power is executed;² but where the warrant is to confess “at any time from and after date,” a judgment can not be taken until after the day of the date has elapsed.³ A judgment by confession is not void because entered by the clerk on a legal holiday.⁴

Attorney's fees.—A judgment by confession, on a warrant of attorney, may properly include attorney's fees, if authorized by the warrant.⁵ But where a promissory note contains an agreement on the part of the maker, that in case suit is brought on the note he will pay a certain sum as attorney's fees, such sum is not due until after suit is brought, and can not be included in the judgment.⁶ Where a warrant of attorney authorizes a confession for amount due, “and a reasonable attorney's fee,” the court must determine the reasonable attorney's fee.⁷

The moral obligation resting on a debtor to see that his creditor gets all his money without deduction for fees, is a sufficient consideration for the confession of a judgment, including reasonable attorney's fees; but where the debtor is insolvent, it is held that the including of attorney's fees is fraudulent and void as to other creditors.⁸

Confession by a partner.—One partner can not execute a warrant of attorney, to confess a judgment in the firm name,

¹ *Sherman v. Baddely*, 11 Ill. 622; *Adams v. Arnold*, 86 Ill. 185; *Frye v. Jones*, 78 Ill. 627; *McDonald v. Chisholm*, 131 Ill. 273.

² *Thomas v. Mueller*, 106 Ill. 36; *Cummins v. Holmes*, 11 Ill. App. 158; *Cohen v. Burgess*, 44 Ill. App. 206; *Bank v. Havens*, 61 Ill. App. 211.

³ *Waterman v. Jones*, 28 Ill. 54; *White v. Jones*, 38 Ill. 159; *Chisholm v. McDonald*, 30 Ill. App. 176.

⁴ *Bradley v. Clandon*, 45 Ill. App. 326, and cases there cited.

⁵ *Bull v. Miller*, 38 Ill. 110; *Weigley v. Matson*, 125 Ill. 64.

⁶ *Nickerson v. Babcock*, 29 Ill. 497.

⁷ *Campbell v. Goddard*, 117 Ill. 251; same case, 123 Ill. 220; see *Folansbee v. Mtg. Co.*, 5 Bradw. 17; *Soles v. Sheppard*, 99 Ill. 620; *Keith v. Kellogg*, 97 Ill. 147.

⁸ *Hulse v. Mershon*, 125 Ill. 52.

without express authority from the other partner, or the ratification of the act by the latter;¹ but to enable a third party to raise the question, he must show that his rights have been invaded.²

Confession by corporation.—Neither the president nor treasurer of a corporation has an implied power, by virtue of his office, to confess a judgment against the corporation.³ They can only exercise such power when it has been given them in express terms by the board of directors.⁴

Where the general financial manager of a corporation executes a judgment note in the course of business, he will be presumed to have acted within the scope of his power, even though no resolution of the directors is shown; and a stranger dealing with him, without notice of want of authority, will be protected. If the act is knowingly acquiesced in by the corporate authorities, it becomes binding.⁵

By an infant.—A minor can not execute a valid warrant to confess a judgment, and a judgment based upon such warrant is void.⁶

In cases of tort.—The practice of entering judgment by confession upon warrant of attorney, without process, in actions for tort, is not allowable by the common law. It is allowed only in respect to debts.⁷

Sureties.—The statute concerning sureties provides that no surety shall be suffered to confess judgment, or suffer judgment to go by default, so as to distress his principal, if the latter will enter himself as defendant to the suit, and tender to the surety other good and sufficient collateral security, to be approved by the court in which the suit shall be pending.⁸

¹ *Heir v. Kaufman*, 134 Ill. 215; *Sloo v. Bank*, 1 Scam. 428; *Martin v. Judd*, 60 Ill. 78; *Uhlendorf v. Kauffman*, 41 Ill. App. 375.

² *McCormick v. Coe*, 53 Ill. App. 488; *Martin v. Judd*, 60 Ill. 78; *Farwell v. Cook*, 42 Ill. App. 291.

³ *Joliet v. Ingalls*, 23 Ill. App. 45; *Adams v. Print. Co.*, 27 Ill. App. 313; *Boston v. Fisher*, 59 Ill. App. 400.

⁴ *Adams v. Print. Co.*, 27 Ill. App.

313; see *Burch v. West*, 134 Ill. 258; *Bailey v. Snyder*, 61 Ill. App. 472.

⁵ *Atwater v. Bank*, 152 Ill. 605; *McDonald v. Crisholm*, 131 Ill. 273; *Morawetz on Corp.*, Sec. 6-18.

⁶ *Fuqua v. Sholem*, 60 Ill. App. 140.

⁷ *French v. Willer*, 126 Ill. 611; *Burns v. Nash*, 23 Ill. App. 552.

⁸ 2 *Starr & Curtis* 2373; *Rev. Stat.* (1893) 1420; *Rev. Stat.* (1895) 1518.

Vacating judgment.—Courts of law possess an equitable jurisdiction over judgments entered by confession upon warrants of attorney,¹ and in proper cases will liberally exercise such jurisdiction.²

The question, on a motion to vacate the judgment, is not whether it shall be set aside for errors of law, but whether there are equitable reasons why it should be opened up to let in a defense.³

Where an application is made for the exercise of this equitable power, and it clearly appears that the plaintiff was not entitled to judgment on the bond, or note, and warrant of attorney, the court will vacate the judgment, and leave him to pursue the ordinary remedy by action; but if the case is involved in doubt, or the testimony is so contradictory that the truth can not be ascertained with reasonable certainty, an issue may be directed to try the question—in other words, the defendant may be let in to make a defense on the merits.⁴

The court, in such case, will fully protect the rights of the parties, by staying all proceedings on the judgment, and permitting it to stand on a lien and security, until the merits of the case are heard and determined. If the defense is successful, the judgment fails; if otherwise, the judgment is to be enforced.⁵ The court has power to open a judgment when usury is alleged, to hear the parties, and reduce the amount of the judgment or set it aside altogether.⁶ If a judgment is entered by confession for more than is authorized by the war-

¹ *Condon v. Besse*, 86 Ill. 159; *Lake v. Cook*, 15 Ill. 353; *Campbell v. Goddard*, 17 Ill. App. 382; *Heir v. Kaufman*, 134 Ill. 226; *Farwell v. Huston*, 151 Ill. 239; *Packer v. Roberts*, 140 Ill. 9; *Jordan v. Huntington*, 58 Ill. App. 646; *Bank v. Havens*, 61 Ill. App. 213.

² *Lake v. Cook*, 15 Ill. 353; *Kennedy v. Evans*, 31 Ill. 258; *Hall v. Jones*, 32 Ill. 38; *Burwell v. Orr*, 84 Ill. 465.

³ *Knox v. Bank*, 57 Ill. 330; *Mumford v. Thoman*, 157 Ill. 258.

⁴ *Lake v. Cook*, 15 Ill. 353; *Gor-*

don v. Goodell, 34 Ill. 429; *Hall v. Jones*, 32 Ill. 38; see *Bolton v. McKinley*, 22 Ill. 203; *Stein v. Good*, 115 Ill. 93.

⁵ *Farwell v. Huston*, 151 Ill. 239; *Lake v. Cook*, 15 Ill. 353; *Condon v. Besse*, 86 Ill. 159; *Norton v. Allen*, 69 Ill. 306; *Gibboney v. Gibboney*, 2 Bradw. 322; *Packer v. Roberts*, 140 Ill. 9.

⁶ *Fleming v. Jenska*, 22 Ill. 475; *McGuire v. Campbell*, 58 Ill. App. 188; *Mumford v. Thomas*, 157 Ill. 258; *Chicago v. Bank*, 145 Ill. 481.

rant of attorney, application should be made in the court where the judgment was entered, to correct it,¹ but a stranger to the record can not complain, although he be a creditor.²

An assignee for the benefit of creditors is the proper party to make the motion to vacate a judgment confessed by the assignor, before making the assignment.³

Where the defendant has been let in to plead, the original judgment standing as security, and the amount thereof was reduced by a verdict, an order of the court, that only the amount found by the jury should be made on the execution already issued, was held to have been properly made.⁴

The like rule prevails in all cases of mere irregularity in the entry of judgment by confession; and on application to set aside the judgment, some equitable ground for relief must be shown.⁵

A judgment entered by confession in vacation, on a promissory note, more than a year and a day after its maturity, will not be set aside, or the defendant let in to make a defense, merely because there was no evidence filed that the defendant was still living, and that the debt, or a part of it, remained unpaid, and no order of a judge was obtained for the entry of the judgment. In addition to the want of proof, or an order of a judge, it must appear that the defendant has a meritorious defense.⁶

Where a judgment was confessed on a note, dated April 24,

¹ *Iglehart v. Morris*, 34 Ill. 501; *Stuhl v. Shipp*, 44 Ill. 133; see *Zuckerman v. Solomon*, 73 Ill. 130; *Campbell v. Goddard*, 117 Ill. 251.

² *Adams v. Arnold*, 86 Ill. 185.

³ *Martin v. Knight*, 56 Ill. App. 65; *Roche v. Beldam*, 119 Ill. 320; *Conkling v. Ridgley*, 112 Ill. 36; *Baker v. Barber*, 16 Ill. App. 621; *Kingman v. Reinemer*, 58 Ill. App. 173.

⁴ *Boynton v. Renwick*, 46 Ill. 280; *Page v. Wallace*, 87 Ill. 84; *Walker v. Ensign*, 1 Bradw. 113; *Stein v. Good*, 115 Ill. 93; *Borchsenius v. Canutson*, 100 Ill. 82; *Layton v. Lantz*, 43 Ill. App. 654.

⁵ *Rising v. Brainard*, 36 Ill. 79; *Ball v. Miller*, 38 Ill. 110; *Stuhl v. Shipp*, 44 Ill. 133; *Campbell v. Goddard*, 17 Bradw. 382; *Pucker v. Roberts*, 140 Ill. 9; *Hansen v. Schlesinger*, 125 Ill. 230; *Heir v. Kaufman*, 134 Ill. 226; *Atkinson v. Foster*, 134 Ill. 472.

⁶ *Hempstead v. Humphreys*, 38 Ill. 90; see *Hinds v. Hopkins*, 28 Ill. 344; *Rising v. Brainard*, 36 Ill. 79; *Farwell v. Meyer*, 36 Ill. 510; *Stein v. Good*, 16 Bradw. 516; *Alldritt v. Bank*, 22 Ill. App. 24.

1856, under a warrant of attorney authorizing a confession of judgment on a note, dated April 24, 1846, it was held that the judgment was a nullity.¹

The court may set aside a judgment by confession, on motion, during the term in which it is rendered; and this exercise of discretion is not a matter for review in the supreme court;² but a motion to set aside a judgment by confession, rendered four terms previously, comes too late.³

It has been held that a motion to vacate, filed at the next ensuing term of court after the judgment was confessed, is in apt time,⁴ and that it may be made by the executor of a deceased maker.⁵

Where the note, the warrant of attorney, the cognovit and the judgment all correspond in amount, a variance in that regard between the declaration and the judgment will not avail on a motion to vacate the judgment.⁶

Limitations.—If by the running of the statute of limitations, the debt is barred, the power to confess judgment contained in the power of attorney is also barred.⁷

Power to confess in lease.—A power of attorney for the confession of a judgment for the sum due is not authorized by the statute nor at common law in a case where the amount of the judgment is not fixed in the power, and depends upon the hearing of evidence *dehors* the obligation on which it is based and to which the power is attached. And a power in a lease to confess judgment against the lessee for an uncertain, unliquidated and unlimited amount paid out for water and gas rates, etc., which the lease provided were to become so much additional rent, can not be lawfully either given or exercised;⁸ but it has been held that where the lease provides for a stipulated sum to be paid as rent in installments, a judgment may

¹ *Chase v. Dana*, 44 Ill. 262.

² *Bolton v. McKinley*, 22 Ill. 203; see *Gordon v. Goodell*, 34 Ill. 429; *Iglehart v. Morris*, 34 Ill. 501; *Hall v. Jones*, 32 Ill. 38; *Burwell v. Orr*, 84 Ill. 465; *Evans v. Laundry Co.*, 57 Ill. App. 150.

³ *Austin v. Lott*, 28 Ill. 519; *Hall v. Jones*, 32 Ill. 38.

⁴ *Kingman v. Reinemer*, 58 Ill. App. 173.

⁵ *Whitney v. Bohlen*, 157 Ill. 571.

⁶ *Martin v. Judd*, 60 Ill. 78; *Adams v. Arnold*, 86 Ill. 185.

⁷ *Matzenbaugh v. Doyle*, 156 Ill. 331; *Waldron v. Manson*, 23 Wis. 393; *Brown v. Parker*, 28 Wis. 22.

⁸ *Little v. Dyer*, 138 Ill. 272.

be properly confessed for the amount of rent due as shown by the lease.¹

In forcible detainer.—A judgment entered by confession under a warrant of attorney and cognovit in a forcible detainer suit, is unauthorized by law and void.²

Appeal.—An appeal or writ of error will not lie directly from a judgment rendered by confession when the warrant of attorney waives all errors and all right to appeal from said judgment. It is only from an order overruling a motion to vacate the judgment that it will lie.³

Vacation.—As to what is "vacation" within the language of the statute, see cases noted below.⁴

¹ *Scott v. Mantonya*, 60 Ill. App. 481; see *Bush v. Hanson*, 70 Ill. 480; *Seaver v. Siegel*, 54 Ill. App. 632; *Werkmeister v. Beaumont*, 46 Ill. App. 369; *Fortune v. Barth*, 62 Ill. App. 290.

² *French v. Willer*, 126 Ill. 611; *Burns v. Nash*, 23 Ill. App. 552; see *Ryan v. Kirschberg*, 17 Ill. App. 132; *Links v. Mayer*, 22 Ill. App. 489.

³ *Lake v. Cook*, 15 Ill. 353; *Frear v. Bank*, 73 Ill. 473; *Hall v. Hamil-*

ton, 74 Ill. 437; *Little v. Dyer*, 35 Ill. App. 87; *Werkmeister v. Beaumont*, 46 Ill. App. 370; *Seaver v. Siegel*, 54 Ill. App. 632; *Mumford v. Thoman*, 54 Ill. App. 471; *Carpenter v. Bank*, 119 Ill. 356; *Hall v. Jones*, 32 Ill. 38.

⁴ *Conkling v. Ridgley*, 112 Ill. 36; *Field v. Ridgley*, 116 Ill. 424; *Bank v. Daly*, 34 Ill. App. 173; *Jasper v. Schlesinger*, 22 Ill. App. 637.

CHAPTER XXI.

DISTRESS FOR RENT.

This remedy is of great antiquity, and is said to have prevailed among the Gothic nations of Europe from the breaking up of the Roman Empire. The English statutes since the days of *Magna Charta* have, from time to time, extended and modified its features to meet the exigencies of the times.¹

The legislature of this state has generally, and with some modifications and alterations, adopted the English provisions, recognizing the old remedy as a salutary and necessary one, equally conducive to the security of the landlord and to the welfare of society. Distress for rent does not lie unless the relation of the landlord and tenant exists and there is certain fixed rent in money, produce or service payable at a certain time.²

Landlord's lien.—The statute of Illinois provides that “every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of six months after the expiration of the time for which the premises were demised.”³

The lien of the landlord, upon crops growing or grown, does

¹ Bouv. Law Dict. 485.

² *Murr v. Ray*, 151 Ill. 340; *Murr v. Glover*, 34 Ill. App. 373.

³ 2 Starr & Curtis 1504; Rev. Stat. (1893) 923; Rev. Stat. (1895) 979; *Prettyman v. Unland*, 77 Ill. 206; *Herron v. Gill*, 112 Ill. 247; *Hadden v. Knickerbocker*, 70 Ill.

677; *Craig v. Merime*, 16 Bradw. 214; *Mead v. Thompson*, 78 Ill. 62; *Watt v. Scofield*, 76 Ill. 261; *Thompson v. Mead*, 67 Ill. 395; *O'Hara v. Jones*, 46 Ill. 288; *Gittings v. Nelson*, 86 Ill. 591; *Webster v. Nicols*, 104 Ill. 160.

not depend upon the levy of a distress warrant, but is given by the statute, so that an attaching creditor can not, by bringing an attachment before the issuing of the distress warrant, gain any precedence.¹

A purchaser of grain raised by a tenant, upon which a landlord has a lien for rent, with knowledge of that fact, and that the rent is not fully paid, will be liable to the landlord in trover for the rent due, to the extent of the value of the grain purchased by him.²

But a *bona fide* purchaser without notice, or facts sufficient to put him on inquiry, will not be liable for its value in a personal action, although the landlord may still levy his distress warrant on the grain, if it can be found and identified.³ The lien attaches upon the crops grown upon the demised premises in any given year, for the rent of such year, from the time of the commencement of their growth, whether the rent is then due or not.⁴

What property may be distrained.—"In all cases of distress for rent, the landlord, by himself, his agent or attorney, may seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside; and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant."⁵

If property of a third party temporarily in the possession of a tenant, is taken under a distress against the tenant, the landlord will be liable to the owner for its value.⁶ The same articles of personal property which are, by law, exempt from execution, except the crops grown or growing upon the demised premises, are also exempt from distress for rent.⁷

¹ *Mead v. Thompson*, 78 Ill. 62.

² *Prettyman v. Unland*, 77 Ill. 211;
Carter v. Andrews, 56 Ill. App. 646.

³ *Finney v. Harding*, 136 Ill. 573,
and cases there cited.

⁴ *Watt v. Scofield*, 76 Ill. 261.

⁵ Starr & Curtis, 1500; Rev. Stat. (1893) 921; Rev. Stat. (1895) 977; *Holladay v. Bartholomew*, 11 Bradw. 206; *Becker v. Dupree*, 75 Ill. 167; see *Herron v. Gill*, 112 Ill. 247.

⁶ *Emmert v. Reinhardt*, 67 Ill. 481.

⁷ Starr & Curtis, 1504; Rev. Stat. (1893) 923; Rev. Stat. (1895) 978; see *Johnson v. Prussing*, 4 Bradw. 575; *Lindley v. Miller*, 67 Ill. 244; *Bonnell v. Bowman*, 53 Ill. 460; *Smothers v. Holly*, 47 Ill. 331; *Bingham v. Macey*, 15 Ill. 290; *Cook v. Scott*, 1 Gilm. 333; *McCluskey v. McNeely*, 3 Gilm. 578; *Holladay v. Bartholomew*, 11 Bradw. 206.

“When a tenant abandons or removes from the premises, or any part thereof, the landlord, or his agent or attorney, may seize upon any grain or other crops grown or growing upon the premises or part thereof so abandoned, whether the rent is due or not.¹ If such grain or other crops or any part thereof is not fully grown or matured, the landlord, or his agent or attorney, shall cause the same to be properly cultivated and harvested or gathered, and may sell and dispose of the same, and apply the proceeds, so far as may be necessary, to compensate him for his labor and expenses, and to pay the rent: *Provided*, the tenant may, at any time before sale of the property so seized, redeem the same by tendering the rent due and the reasonable compensation and expenses of the cultivation and harvesting or gathering the same, or he may replevy the property seized.”²

“That if any tenant shall, without the consent of his landlord, sell and remove, or permit to be removed, or be about to sell and remove, or permit to be removed from the demised premises, such part or portion of the crops raised thereon, as shall endanger the lien of the landlord upon such crops for the rent agreed to be paid, it shall and may be lawful for the landlord to institute proceedings by distress before the rent is due, as is now provided by law, in case of the removal of the tenant from the demised premises; and thereafter the proceedings shall be conducted in the same manner as is now provided by law in ordinary cases of distress, where the rent is due and unpaid.”

“When the rent is payable wholly or in part in specific articles of property or products of the premises, or labor, the landlord may distrain for the value of such articles, products or labor.”

“The right of the landlord to distrain the personal goods of the tenant, shall continue for the period of six months after the expiration of the term for which the premises were demised or the tenancy is terminated.”³

¹ See *Finney v. Harding*, 136 Ill. (1895), 979; 2 Starr & Curtis, 1506; 573; *Bunk v. Adam*, 138 Ill. 483. *Hare v. Stegall*, 60 Ill. 380.

² Rev. Stat. (1893) 923; Rev. Stat.

³ *Werner v. Ropiequet*, 44 Ill. 522.

A distress warrant issued after six months from the time of the termination of the lease, is null and void.¹ A landlord can not legally seize the property of his tenant, for rent, without first issuing a distress warrant as provided by statute. It was otherwise at common law.² A distress warrant can not be issued against a dead person, nor against his administrator.³

No. 324. Warrant of distress by landlord.

STATE OF ILLINOIS, }
County of ———. } ss.

To the Sheriff or any constable of said county: (or E. F., agent or attorney).

Distrain the goods and chattels of C. D. which are liable to be distrained, wherever they may be found in the county of ———, where the said C. D. resides, for the sum of ——— dollars, being ——— (*stating the time for which rent is due*), rent due me on the — day of ———, 18—, from the said C. D. for the premises now in his possession, demised to him by me, and situated in said county.

Dated this — day of ———, 18—.

A. B.

No description of the demised premises is necessary to be given in a distress warrant.⁴

A landlord is permitted to make a reasonable distress, and he is not bound to confine himself to the precise amount of rent due. If he were knowingly to claim more rent than was due, for the purpose of oppression and wrong, and levy an amount sufficient for its payment, he would be guilty of willfully and maliciously making an excessive levy; but a mere mistake in judgment as to the value of the property seized, or a want of knowledge of the sum due, can not render him a trespasser.⁵

The action of replevin may be brought to try the legality of a distress for rent, provided there is no sum whatever due for rent; but if any sum is due, and the distress is for a greater sum, or is excessive in regard to the quantity of goods

¹ *Werner v. Ropiequet*, 44 Ill. 522.

² *Arnold v. Phillips*, 59 Ill. App.

213.

³ *Estate v. Noble*, 159 Ill. 311.

⁴ *Alwood v. Mansfield*, 33 Ill. 452.

⁵ *Harms v. Solem*, 79 Ill. 460.

taken, or otherwise is irregular, the remedy must be by an action of case.¹

Return of distress warrant—Inventory.—"The person making such distress warrant shall immediately file with some justice of the peace, if the amount of the claim is within his jurisdiction, or with the clerk of a court of record of competent jurisdiction, a copy of the distress warrant, together with an inventory of the property levied upon."²

No. 325. Inventory to be filed with copy of distress warrant.

STATE OF ILLINOIS, }
County of —, } ss.

An inventory of the several goods and chattels of C. D., distrained by me, on the — day of —, 18—, in the county of —, where the said C. D. resides, by virtue of the warrant and authority, and in behalf of A. B., the landlord, for the sum of — dollars, being for — rent due to the said landlord, on the — day of —, 18—, for the premises in the warrant mentioned, to wit:

(Here describe the property distrained.)

E. F., Sheriff of
— County.

Summons to issue.—"Upon the filing of such copy of distress warrant and inventory, the justice of the peace or clerk shall issue a summons against the party against whom the distress warrant shall have been issued, returnable as other summons."

Notice to non-residents, etc.—"When it shall appear, by affidavit filed in the court where such proceeding is pending, that the defendant is a non-resident or has departed from this state, or on due inquiry can not be found, or is concealed within this state, and the affiant shall state the place of residence of said defendant, if known, and if not known, that upon diligent inquiry he has not been able to ascertain the same, notice may be given, if the suit is before a justice of the peace, as in cases of attachment before justices, or if in a court of record, as in attachment cases in such courts."³

¹ *Hare v. Stegall*, 60 Ill. 380; *Lindley v. Miller*, 67 Ill. 244; see *Speer v. Skinner*, 35 Ill. 282.

² 2 Starr & Curtis, 1501; Rev. Stat. (1893) 921.

³ 2 Starr & Curtis' An. Stat. 1502; Rev. Stat. (1893) 629.

No. 326. *Affidavit for publication against non-residents, etc.*

In the ——— of the county of ——— in the State of Illinois.

A. B.	} Distress for rent.
vs.	
C. D.	

A. B., of, etc., on oath states, that C. D., the above named defendant, is a non-resident, (or “*has departed from this state,*” or “*on due inquiry can not be found,*” or “*is concealed within this state,*” as the case may be), and that the place of residence of the said C. D. is ——— (or “*is not known, and upon diligent inquiry affiant has not been able to ascertain the same.*”)

Subscribed and sworn, etc.

A. B.

Proceedings—Pleadings.—The statute provides that “the suit shall thereafter proceed in the same manner as in case of attachment before such court of justice of the peace; *provided*, that it shall not be necessary for the plaintiff in any case to file a declaration, but the distress warrant shall stand for a declaration, and shall be amendable, as other declarations, *provided*, that no such amendment shall in any way affect any liabilities that may have accrued in the execution of such warrant.”¹ Where a plaintiff files an affidavit of claim with the distress warrant, the defendant is bound to file with his pleas an affidavit of merits.²

The statute provides that proceedings in distress shall be the same as in attachment cases, and the distress warrant shall stand as a declaration. In attachment cases, the defeat of the attachment, where there was personal appearance, does not defeat the action, only the lien of the attachment, and this rule applies in distress for rent, to allow a recovery for the rent where there is personal appearance and defense to the merits.³ A distress warrant is not a lien prior to executions, except as to growing crops.⁴

Defenses—Set-off, etc.—The statute provides that “the defendant may avail himself of any set-off or other defense

¹ Rev. Stat. (1893), 922; Rev. Stat. (1895), 977; 2 Starr & Curtis, 1502; *Holley v. Metcalf*, 12 Bradw. 141; see *Olds v. Loomis*, 10 Bradw. 498; *Cunnea v. Williams*, 11 Brad. 72; *Alwood v. Mansfield*, 33 Ill. 452; *Bartlett v. Sullivan*, 87 Ill. 219.

² *Bartlett v. Sullivan*, 87 Ill. 219.

³ *Holley v. Metcalf*, 12 Bradw. 141; see *Alwood v. Mansfield*, 33 Ill. 452; *Kruse v. Kruse*, 68 Ill. 188; *Storing v. Onley*, 44 Ill. 123.

⁴ *Rowland v. Hewitt*, 19 Bradw. 450; *Herron v. Gill*, 112 Ill. 247.

which would have been proper if the suit had been for the rent in any form of action, and with like effect.”¹

In a distress for rent, where the defendant pleads no rent in arrear only, he can not recover judgment for damages. To authorize this he must plead a set-off, either specially, or give notice under the general issue. The action is for rent only, and unless the defendant opens the door to the investigation of other matters, by pleading a set-off, the rent alone is the proper subject-matter of the suit, and to this the proof should be confined. But if the tenant pleads a set-off, the landlord, by way of replication, may plead any matter of defense, such as a set-off, the same as if he were sued as defendant; but the landlord, in such case, can not recover for any excess of his set-off over that of the tenant. The prayer of judgment in such replication should be as claimed in the declaration.²

The statute giving the tenant the right to avail himself of a set-off was intended to apply only to cases where, upon a fair adjustment of all counter claims other than the rent, the landlord will be indebted to the tenant, and in such case gives the tenant the benefit of his claim on such balance.³

Judgment for plaintiff.—“If the plaintiff succeeds in his suit, judgment shall be given in his favor for the amount which shall be due him. When the defendant has been served with process, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons, and execution may issue thereon, not only against the property distrained, but also against the other property of the defendant. But the property distrained, if the same has not been replevied or released from seizure, shall be first sold.”⁴

When there has been personal service, or a personal appearance, a judgment rendered is final and conclusive between the

¹ 2 Starr & Curtis, 1502; Rev. Stat. (1893) 922; Rev. Stat. (1895) 977; see *Sketoe v. Ellis*, 14 Ill. 75; *Lindley v. Miller*, 67 Ill. 244; *Lynch v. Baldwin*, 69 Ill. 210.

² *Cox v. Jordan*, 86 Ill. 560; see *Asay v. Sparr*, 26 Ill. 115.

³ See *Lynch v. Baldwin*, 69 Ill. 210;

Lindley v. Miller, 67 Ill. 244; *Hatfield v. Fullerton*, 24 Ill. 280.

⁴ Rev. Stat. (1893) 922; Rev. Stat. (1895) 978; 2 Starr & Curtis 1502; *Clevenger v. Dunaway*, 84 Ill. 367; *Kruse v. Kruse*, 68 Ill. 188; *Rauh v. Ritchie*, 1 Bradw. 188.

parties as to all matters that should have been determined in the proceeding, the chief of which is, whether rent was due, and if so, what amount.¹

Where there is no personal service, etc.—"Where publication of notice shall have been made, as provided by this act, but the defendant is not served with process, and does not appear, judgment by default may be entered, and the plaintiff may recover the amount due him for rent at the time of issuing the distress warrant, and a special execution shall issue against the property distrained, but no execution shall issue against any other property of the defendant."

Judgment for defendant, etc.—The statute further provides that "if the judgment is in favor of the defendant, he shall recover costs and have judgment for the return of the property distrained, unless the same has been replevied or released from such distress. And if a set-off is interposed, and it appears that a balance is due from the plaintiff to the defendant, judgment shall be rendered for the defendant for the amount thereof.

Release of property distrained—Bond.—"When any distress warrant has been levied, the person whose property is distrained may release the same by entering into bond in double the amount of the rent claimed, payable to the landlord, with sufficient sureties, to be approved by the person making the levy if the bond is tendered before the filing of the copy of the warrant, as provided in this act, or if after, by the clerk of the court in which, or justice of the peace before whom, the suit is pending, conditioned to pay whatever judgment the landlord may recover in the suit, with costs of suit. If the bond is taken before the filing of a copy of the distress warrant, such bond shall be filed therewith; and if taken after the filing of a copy of the distress warrant, it shall be filed in the court, or with the justice, where the suit is pending."²

Perishable property.—"If any property distrained is of a perishable nature, and in danger of immediate waste or decay, and the same is not replevied or bonded, the landlord or his

¹ See *Clevenger v. Dunaway*, 84 Ill. 367.

² See *Rauh v. Ritchie*, 1 Bradw. 188.

agent or attorney may, upon giving notice to the defendant or his attorney, if either can be found in the county, or if neither can be found, without any notice, apply to the judge or a master in chancery of the court in which, or the justice of the peace before whom, the suit is pending, describing the property, and showing that the same is so in danger, and if such judge, master or justice of the peace is satisfied that the property is of a perishable nature and in danger of immediate waste or decay, and if the defendant or his attorney is not served with notice, or it does not appear that he can not be found in the county, he may issue an order to the person having possession of the property, directing the sale thereof upon such time and such notice, terms and conditions as the judge, master or justice of the peace shall think for the best interest of the parties concerned. The money arising from such sale shall be deposited with the clerk of the court in which, or justice of the peace before whom the suit is pending, there to abide the event of the suit."

Rights against sub-lessees, etc.—The statute provides that "In all cases where the demised premises shall be sub-let, or the lease is assigned, the landlord shall have the same right to enforce his lien against the sub-lessee or assignee that he has against the tenant to whom the premises were demised."

There can be no distress, unless there has been an actual demise, at a certain fixed rent; and unless it be for rent due.¹

A purchaser at a foreclosure sale can not distrain for rent, unless the tenant has attorned to him.² A person not occupying the position of lessor, grantee, assignee or heir, can not maintain a distress.³

¹ *Johnson v. Prussing*, 4 Bradw. 575.

² *Reed v. Bartlett*, 9 Bradw. 267.

³ *McGillick v. McAllister*, 10 Bradw.

40; *Taylor's Land. & Ten.* 561-4; *Hatfield v. Fullerton*, 24 Ill. 278; *Leitch v. Boyington*, 84 Ill. 179.

CHAPTER XXII.

CASE.

By the 21st section of the Illinois Practice Act, it is enacted that "the distinctions between the actions of *trespass* and *trespass on the case* are hereby abolished; and in all cases where trespass or trespass on the case have been heretofore the appropriate form of action, either of said forms may be used, as the party bringing the action may elect."¹

This section allows counts in trespass and counts in case to be joined in one declaration, and the action to be called either trespass or case, but each count must state a complete cause of action either in trespass or case; and the evidence must correspond with the pleadings.²

Trespass on the case is the form of action usually resorted to for the redress of wrongs done to a man's person, reputation, goods or estate, without direct force. It lies for negligence or nonfeasance, that is, the omission of what one is bound by law to perform; misfeasance, that is, an improper performance of what one has a right to do in a proper manner, or what one has undertaken, or is bound by law to perform; or malfeasance, that is, doing what is illegal, or what one has no right to do; whereby a consequential injury results to another.

It is a familiar principle that where a person exercises or enjoys a peculiar privilege, productive of benefit to him alone, the law requires that he shall exercise extraordinary care to so use or enjoy such special privilege that no injury shall result through such use or enjoyment to other persons.³

¹ Rev. Stat. (1893), 1074; Rev. Stat. (1895), 1158; 2 Starr & Curtis 1787; *Krug v. Ward*, 77 Ill. 603; *Barker v. Koozier*, 80 Ill. 205.

² *Gay v. DeWerff*, 17 Bradw. 417;

Blalock v. Randall, 76 Ill. 224; *R. Co. v. Summit*, 3 Bradw. 155.

³ *Nelson v. Godfrey*, 12 Ill. 20; see *Schwartz v. Gilmore*, 45 Ill. 455; *R. Co. v. Middlesworth*, 46 Ill. 494;

An action on the case will lie against one erecting a nuisance, or one continuing a nuisance erected by another.¹

Case lies where the plaintiff has been aggrieved and damaged by the commission of unlawful acts by the defendants, in pursuance of a combination or conspiracy for that purpose.²

This action lies also against one who knowingly sells unwholesome meat;³ and against a public officer, for refusing the plaintiff's vote at a town meeting.⁴

An officer who negligently permits the escape of a prisoner, is liable to any person injured by such neglect of official duty.⁵

A constable, having the custody of a person on a bastardy warrant, is liable to the mother of the illegitimate child, for negligently suffering such prisoner to escape.⁶

Case lies against a magistrate for a corrupt refusal to allow an appeal from his decision.⁷ If a justice of the peace acts corruptly, he can be made to answer criminally and civilly.⁸

When the receiver of a telegram is injured by reason of the careless and negligent performance of the telegrapher's duty the proper remedy is an action on the case.⁹

Where stock is shipped under a special contract and damage is sustained to such stock, the shipper may have his action on the case for damages.¹⁰

Actions upon the case do not depend upon the holding by the plaintiff of a legal estate in the thing for an injury to which the action is brought.¹¹ The action of case is a proper

R. R. Co. v. Phillips, 49 Ill. 234;
Springfield v. LeClaire, 49 Ill. 476.

¹ *Arundel v. McCulloch*, 10 Mass. 72; see *Gas Co. v. Graham*, 28 Ill. 73; *Gas Co. v. Thompson*, 39 Ill. 599; *Marmar v. Lussem*, 65 Ill. 484; *Guest v. Reynolds*, 68 Ill. 478.

² *Mott v. Danforth*, 6 Watts (Penn.) 306; *Griffith v. Ogle*, 1 Binn. 172; *Mitchell v. Penrod*, 8 Serg. & R. 522; *Polk v. Fancher*, 1 Head 336.

³ *Peckham v. Holman*, 11 Pick. 484.

⁴ *Osgood v. Bradley*, 7 Greenl.

(Me.) 411; see *Mills v. McCabe*, 44 Ill. 194.

⁵ *Brown v. Genung*, 1 Wend. 115; *Pease v. Hubbard*, 37 Ill. 257; *Williams v. Mostyn*, 4 M. & W. 145; *Sawyer v. Ballew*, 4 Port (Ala.) 116.

⁶ *Pease v. Hubbard*, 37 Ill. 257.

⁷ *Tompkins v. Sands*, 8 Wend. 462.

⁸ *Garfield v. Douglas*, 22 Ill. 100.

⁹ *Tel. Co. v. Dubois*, 128 Ill. 254.

¹⁰ *Coles v. R. R. Co.*, 41 Ill. App. 609.

¹¹ *Chitty's Pl.*, title, Actions on the Case; *Yates v. Joyce*, 11 Johns. 136;

proceeding for an injury to property when the interest in it is in reversion.¹

Such action is an appropriate remedy for a mortgagor when property has been injured while in the possession of the mortgagee.²

Where one person makes an unauthorized and tortious use of the property of another, and thereby realizes profits, the owner may disaffirm the transaction and sue as for a tort, or he may waive the tort and recover the money realized, in an action for money had and received.³

A lunatic is liable in a civil action for a tort committed by him.⁴

Case may be maintained against a sheriff, for taking an insufficient bond in replevin;⁵ or for not returning an execution, though the plaintiff may proceed by attachment.⁶ And case lies also against a person who has neglected to attend and give evidence in a cause, after service of *subpœna*.⁷

Case lies for an infringement of a copyright.⁸

It lies for not repairing fences, whereby cattle got into plaintiff's field.⁹

Where goods are deposited with a party, to be sold at not less than a certain fixed price, and the depositary sells them at a less price, case, not trover, is the proper remedy.¹⁰

An action on the case may be sustained against an inn-

Schalk v. Kingsley, *supra*; *Newman v. Tymeson*, 13 Wis. 191.

¹ Chitty's Pl., title, Actions on the Case; *Frankenthal v. Mayer*, 54 Ill. App. 160.

² *Woodside v. Adams*, 40 N. J. L. 417, 422, 424, 426; *Jackson ads. Turrell*, 39 N. J. L. 329, 333; *Jones on Chattel Mortgages*, Sec. 683; *Leach v. Kimball*, 34 N. H. 568; *Russell v. Butterfield*, 21 Wend. 300; *Schalk v. Kingsley*, 42 N. J. L. 32.

³ *Drill Co. v. Ashurst*, 148 Ill. 115.

⁴ *McIntyre v. Scholtz*, 24 Ill. App. 605; 1 Chit. Pl. 76; *Cooley on Torts*, 100; *Ex parte Leighton*, 14 Mass.

207; *Kron v. Schoonmaker*, 3 Barb. 649; *Morse v. Crawford*, 17 Vt. 499.

⁵ Rev. Stat. (1893), 1173; Rev. Stat. (1895), 1257; *Starr & Curtis* 2014; *People v. Robinson*, 89 Ill. 159; *People v. Core*, 85 Ill. 248.

⁶ *Burk v. Campbell*, 15 Johns. 456.

⁷ *Pearson v. Iles*, Doug. 556; *Hullet v. Mears*, 13 East 17, n; 2 Chit. Pl. 757.

⁸ *Clementi v. Goulding*, 11 East 244; 1 Camp. 94.

⁹ 1 Salk. 335; *Saxton v. Bacon*, 31 Vt. 540.

¹⁰ 16 Johns. 74.

keeper, for goods lost or stolen out of his inn, without proving negligence.¹

Case lies by a husband against his wife's father, for enticing her away.²

Ministerial officers may be sued in case for any breach of duty, whether intentional, or malicious, or not.³

An action on the case may be brought in the name of the principal, for a false representation made to the agent.⁴

Case will lie for the assertion of a falsehood with a fraudulent intent, as to an existing fact, where a direct, positive and material injury results from such assertion.⁵ And it will lie for a deceit, as where a person is induced to purchase land by a false representation that a certain privilege is annexed to the land, but which is not included in the deed.⁶

If a person falsely represents himself as the agent of another, and authorized to receive certain money, and thereby obtains the money, he may be reached by a special action on the case for fraud.⁷ Fraud or deceit, wherefrom damage results, is a good cause of action.⁸ Where a person makes a false representation to another, with a design to deceive and defraud him, and the latter enters into a contract with a third person, relying upon the representations, and sustains an injury thereby, an action on the case, in the nature of deceit, will lie at the suit of the person injured against the person making the fraudulent representations, although he was not a party to the contract by which the plaintiff was injured.⁹

¹ *Clute v. Wiggins*, 14 Johns. 175;
Hayward v. Merrill, 94 Ill. 349;
Perry v. Carmichael, 95 Ill. 519.

² *Hutchinson v. Peck*, 5 Johns. 196;
Barber v. Amstead, 10 Ired. 530.

³ *Keith v. Howard*, 24 Pick. 292;
Spicer v. Cummings, 23 Pick. 224;
Gates v. Neal, 23 Pick. 308; *Abbott v. Kimball*, 19 Vt. 551.

⁴ *Raymond v. Howland*, 12 Wend. 176; *Ins. Co. v. Hogan*, 80 Ill. 35.

⁵ *Benton v. Pratt*, 2 Wend. 384;
Eames v. Morgan, 37 Ill. 260.

⁶ *Monell v. Weller*, 13 Johns. 395;
see *Applebee v. Rumery*, 28 Ill. 280;

Van Valser v. Seeberger, 59 Ill. App. 322.

⁷ *Duncan v. Niles*, 32 Ill. 532.

⁸ *Upton v. Vail*, 6 Johns. 181;
Barney v. Dewey, 13 Johns. 224;
Duncan v. Niles, 32 Ill. 532; *Eames v. Morgan*, 37 Ill. 260; *Brown v. Lobdell*, 50 Ill. App. 559; *People v. Healey*, 128 Ill. 9.

⁹ *Weatherford v. Fishback*, 3 Scam. 173; see *Low v. Martin*, 18 Ill. 290; *Eames v. Morgan*, 37 Ill. 260. See observations under Form No. 344, *post*.

In an action for deceit in the sale of a horse, what the consideration to be paid was, or whether it was paid down or not, is not material.¹

Where one person owns the ground rooms in a building, and another the upper stories, the latter has a right to have his portion of the tenement supported by the division wall in the lower part; and the removal of such support by the owner of the lower part of the building is such an infringement of that right as will sustain an action on the case against the wrong-doer.²

Where a person borrows a horse of another, for use, without compensation, he becomes a gratuitous bailee, and is liable for an injury to the horse while in his custody, unless he has exercised extraordinary care.³

An action on the case for seduction may be sustained, not only by a parent, but by a guardian, master, brother-in-law, or other person standing *in loco parentis* to the person seduced.⁴

A party is liable in an action on the case for damage done to the property of another by setting fire to a prairie.⁵

Case lies for criminal conversation with the plaintiff's wife,⁶ or he may sue in trespass, at his election.⁷

An action on the case will not lie for improperly causing a writ of injunction to be issued. The remedy is on the injunction bond.⁸

In an action on the case for malicious prosecution, want of probable cause must be shown. The existence of malice is not sufficient to raise a presumption of a want of probable cause, though a want of probable cause may raise a presumption of malice. In order to sustain such action, there must be proof both of malice and a want of probable cause.⁹ What is such prob-

¹ *Applebee v. Rumery*, 28 Ill. 280.

² *McConnell v. Kibbe*, 33 Ill. 175.

³ *Bennett v. O'Brien*, 37 Ill. 250.

⁴ *Ball v. Bruce*, 21 Ill. 161; see *Anderson v. Ryan*, 3 Gilm. 583.

⁵ *Burton v. McClellan*, 2 Scam. 434.

⁶ *Van Vactor v. McKillip*, 7 Blackf. 578.

⁷ *Yundt v. Hartrunft*, 41 Ill. 9; 1 Chit. Pl. 128.

⁸ *Gorton v. Brown*, 27 Ill. 489.

⁹ *Leidig v. Rawson*, 1 Scam. 272; *Jacks v. Stimpson*, 13 Ill. 701; *Wade v. Walden*, 23 Ill. 425; *Murray v. Long*, 1 Wend. 140; *Potter v. Searl*, 8 Cal. 217; *Barrett v. Spaid*, 70 Ill. 408; *Ames v. Snider*, 69 Ill. 376;

able cause as will justify the prosecution of a person for a criminal offense, is a question of law. An honest belief that the accused is guilty, founded on circumstances which tend to show that he has committed a criminal offense, negatives the idea of a want of probable cause for the prosecution.¹

An action on the case for malicious prosecution can not be brought before the former suit has been legally determined, and it must be averred that the former suit terminated in the present plaintiff's favor.²

(See observations under Form No. 338, *post*.)

Causing water to flow back upon the land of another is such an act as entitles the person injured to his action. Although the act may be in itself lawful, yet, if in its consequences it necessarily damages the property of another, the person occasioning the damage may be compelled to make reparation commensurate with the injury he has caused.³

If two or more persons are jointly concerned in a particular act which occasions injury to another, they may be sued jointly, and all persons who co-operate in an act directly causing injury are jointly liable for its consequence, if they act in concert, or unite in causing a single injury, even though acting independently of each other.⁴

In the case of several tortfeasors, the party injured may, at his election, sue one, or several, or all; and when the suit is against one or some of them, but not against all, the person or persons sued have no right to complain. And so, also, when there is a suit against several tortfeasors, the dismissal of the action against one or a covenant not to sue him does not bar the action against the others.⁵ But a release to one of

Davis v. Wisher, 72 Ill. 262; *Calef v. Thomas*, 81 Ill. 478.

¹ *Jacks v. Stimpson*, 13 Ill. 701; *Fisher v. Forrester*, 33 Penn. St. 501; *Potter v. Searl*, 8 Cal. 217; *Harp- ham v. Whitney*, 77 Ill. 32; *Palmer v. Richardson*, 70 Ill. 544; *Brown v. Smith*, 83 Ill. 291; see observations under Form No. 338, *post*.

² *Feazle v. Simpson*, 1 Scam. 30; 2 Chit. Pl. 610, *n*.

³ *Stout v. McAdams*, 2 Scam. 67; *Nevins v. Peoria*, 41 Ill. 502; *Gillham v. Madison*, 49 Ill. 484; see *R. R. Co. v. Hunter*, 50 Ill. 325; *Winkler v. Meister*, 40 Ill. 349.

⁴ *Machine Co. v. Keifer*, 134 Ill. 481.

⁵ *Chicago v. Babcock*, 143 Ill. 358; *R. R. Co. v. Ross*, 142 Ill. 9; *Fisher v. Cook*, 23 Ill. App. 621; *Knapp v.*

several joint tort feorsors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others.¹

Negligence.—One can not recover for an injury, even from the gross negligence of another, unless he is free from culpable negligence on his own part.² The doctrine of comparative negligence is no longer the law in Illinois, and in order to entitle the plaintiff to recover in an action for negligence, he need only show that at the time of the injury he was in the exercise of ordinary care, and that the defendant was guilty of such negligence as caused the injury.³

Whether there was negligence or want of care in whatever degree, in either of the parties, is a question of fact, to be determined by the jury; and whether the circumstances attending the transaction constitute such negligence or want of care, will not, though admitted, be decided by the court as a matter of law, but will be left to the jury, as evidence for them to pass upon. This is especially true where the circumstances in question are but part of the evidence in the case.⁴

It is only when the conclusion of negligence necessarily re-

Roche, 94 N. Y. 329; *Sloan v. Her-
rick*, 49 Vt. 327; *Bloss v. Plymale*, 8
W. Va. 393.

¹ *Cooley on Torts*; *Turner v. Hitch-
cock*, 20 Iowa 310; *Gilpatrick v.
Hunter*, 24 Me. 18; *Ellis v. Bitzer*, 2
Ohio 89; *Metz v. Soule*, 40 Iowa 230;
Bronson v. Fitzpatrick, 1 Hill 185;
Newman v. Fowler, 37 N. J. 89; *Karr
v. Barstow*, 24 Ill. 580; *City v. Bab-
cock*, 143 Ill. 358; *Wagner v. St.
Yds.*, 41 Ill. App. 410; *Vigeant v.
Scully*, 35 Ill. App. 46.

² *R. R. Co. v. Elliott*, 98 Ill. 481;
Id. v. Dimick, 96 Ill. 42; *Id. v.
Patterson*, 93 Ill. 290; *Stratton v.
R. R. Co.*, 95 Ill. 25; *Austin v. R. R.
Co.*, 91 Ill. 35; *R. R. Co. v. Wallace*,
110 Ill. 114; *Peoria v. Simpson*, 110
Ill. 294; *R. R. Co. v. Londergan*, 118
Ill. 41; *Id. v. Welsh*, 118 Ill. 572; *Gas
Co. v. O'Brien*, 118 Ill. 174; *R. R. Co.
v. Bragioner*, 119 Ill. 51; *Trans. Co.*

v. Shacklet, 119 Ill. 232; *Penn. Co. v.
Marshall*, 119 Ill. 399; *R. R. Co. v.
Clayberg*, 107 Ill. 644; *Chicago v.
Stearnes*, 105 Ill. 554; *Cowden v. Ely*,
37 Ill. 338; *R. R. Co. v. Johnson*, 135
Ill. 647.

³ *Coal Co. v. Holmquist*, 152 Ill.
581; *City v. Daugherty*, 153 Ill. 163;
Village v. Moore, 124 Ill. 133; *R. R.
Co. v. Mathews*, 153 Ill. 268; *R. R.
Co. v. Meixner*, 160 Ill. 320.

⁴ *Beers v. R. R. Co.*, 19 Conn. 506;
2 Am. R. R. Cases 114; *Brown v. R.
R. Co.*, 31 Barb. (N. Y.) 385; see *R.
R. Co. v. Weldon*, 52 Ill. 290; *Id. v.
Baches*, 55 Ill. 380; *Myers v. R. R.
Co.*, 113 Ill. 389; *Penn. Co. v. Frana*,
112 Ill. 405; *Canning Co. v. Innes*,
125 Ill. 410; *R. R. Co. v. Parker*, 131
Ill. 564; *Id. v. Davis*, 130 Ill. 149;
Id. v. Lane, 130 Ill. 122; *Id. v. Voel-
kers*, 129 Ill. 552; *Id. v. Warner*, 123
Ill. 38.

sults from the statement of fact, that the court can be called upon to say to the jury that a fact establishes negligence as a matter of law; and if the conclusion of negligence, under the fact stated, may or may not result, or shall depend on other circumstances, the question is one of fact for the jury. Negligence can not be conclusively established by a state of facts upon which fair minds may well differ.¹

In an action for an injury to the plaintiff, resulting from the negligence of the defendant, the care required of the plaintiff is that degree of care which may reasonably be expected from one in his situation, that is reasonable care; and if this degree of care be exercised by him, the want of a less degree will not preclude him from a recovery for the negligence of the defendant. And what will be deemed reasonable care in any case will depend on the peculiar circumstances of the particular case.² Although the plaintiff may be chargeable with some degree of negligence, yet if it is but slight as compared with that of the defendant, the plaintiff can recover, and this rule holds even where the slight negligence of the plaintiff in some degree contributed to the injury.³

The law is well settled that in actions based on negligence the allegations of the declaration and the proofs must agree.

¹ *R. R. Co. v. O'Connor*, 119 Ill. 586; *Id. v. Voelkers*, 129 Ill. 540; *Id. v. Lane*, 130 Ill. 116; *Id. v. Johnson*, 135 Ill. 641; *Id. v. Robinson*, 127 Ill. 12; *Id. v. Louis*, 138 Ill. 9; *Id. v. Ouska*, 151 Ill. 232.

² *Beers v. R. R. Co.*, 19 Conn. 566; 2 Am. R. R. Cases 114; *Bird v. Holbrook*, 4 Bing. 628; *R. R. Co. v. Hazard*, 26 Ill. 373; *Id. v. Fay*, 16 Ill. 558; *Coursen v. Ely*, 37 Ill. 338; *R. R. Co. v. Adler*, 129 Ill. 340; *Id. v. Wilson*, 133 Ill. 60; *Id. v. Hutchinson*, 120 Ill. 587; *Carterville v. Cook*, 129 Ill. 155; *R. R. Co. v. Parker*, 131 Ill. 573; *Id. v. Havelick*, 131 Ill. 180.

³ *Coursen v. Ely*, 37 Ill. 338; see *R. R. Co. v. Hogarth*, 38 Ill. 370; *Id.*

v. Triplett, 38 Ill. 482; *Id. v. Pane*, 49 Ill. 499; *Id. v. Gretzner*, 46 Ill. 74; *Id. v. Todd*, 36 Ill. 409; *Id. v. Harris*, 54 Ill. 528; *Id. v. Pondram*, 51 Ill. 333; *Id. v. Gravey*, 55 Ill. 379; *Id. v. Hart*, 87 Ill. 529; *Id. v. Parker*, 131 Ill. 565; *C. D. F. Co. v. Van Dam*, 149 Ill. 337; *R. R. Co. v. Bodemer*, 139 Ill. 596; *W. S. Co. v. Whalen*, 151 Ill. 472; *Harris v. Shebeck*, 151 Ill. 287; *Goldie v. Warner*, 151 Ill. 551; *Village v. Brooks*, 150 Ill. 97; *City v. Smith*, *Ibid.* 169; *Partlow v. R. R. Co.*, *Ibid.* 321; *R. R. Co. v. Baddley*, *Ibid.* 328; *Coal Co. v. Bruce*, *Ibid.* 449; *Ry. Co. v. Hessions*, 150 Ill. 546; *R. R. Co. v. Eldridge*, 151 Ill. 542.

The plaintiff can not charge in his declaration a specific act of negligence, and succeed on the trial by proving another act of negligence wholly different from that charged.' In determining the degree of negligence of a person, the jury should take into consideration his capacity. A child can not be required to exercise as much care and caution as a person of mature years, but only such care as a person of his age and discretion would naturally use. Ordinary neglect as to a person of full age and capacity, might be gross negligence as to a child.²

COMMENCEMENT OF THE ACTION.

The action is commenced by suing out a summons, or a *capias ad respondendum*; and if the plaintiff is a non-resident, security for costs must be filed.³

DECLARATIONS IN CASE.

For the particular mode of framing declarations in this action, the pleader is referred to the precedents here given, and the observations thereunder. As a general rule, it may be laid down that the declaration should set forth, by way of inducement, the circumstances under which the injury was committed, and should then set forth the injury, and the consequential damages resulting therefrom to the plaintiff.⁴

Counts in trover may be joined with counts in case;⁵ trespass and case may also be joined.⁶

No. 327. *Against a railroad company, for negligently running train across highway, whereby plaintiff was injured, etc.*

In the ——— Court.

—— Term, 18 —.

STATE OF ILLINOIS, }

County of ———, {
 A. B., plaintiff, by E. F., his attorney, complains
 of the ——— railroad company, defendant, of a plea
 of trespass on the case: For that whereas the plaintiff, on, etc., in, etc.,

¹ *R. R. Co. v. Dickson*, 143 Ill. 368; *Stearnes v. Ready*, 135 Ill. 123.

² *Kerr v. Forgue*, 54 Ill. 482; *R. R. Co. v. Dewey*, 26 Ill. 255; *Robinson v. Cone*, 22 Vt. 213; *Birge v. Gardner*, 19 Conn. 507; *City v. Keefe*, 114 Ill. 222; *Scott v. McMennamin*, 51 Ill. App. 121; *R. R. Co. v. Ryan*, 131 Ill. 477; *R. R. Co. v. Slater*, 129 Ill. 100; *Id. v. Wilcox*,

33 Ill. App. 452; *Id. v. Robinson*, 127 Ill. 13.

³ *Ante*, p. 13.

⁴ 1 Chit. Pl. 327.

⁵ 1 Chit. Pl. 181; see *Hays v. Borders*, 1 Gilm. 46; *Brady v. Spureck*, 27 Ill. 479.

⁶ *Krug v. Ward*, 77 Ill. 603; *Barker v. Koozier*, 80 Ill. 205.

was riding in a certain carriage, then and there drawn by a certain horse, upon and along a certain public highway there (to wit, a certain public highway leading from — to —,) at a certain crossing of the said public highway and a certain railroad of the defendant, in the county of — aforesaid; and the defendant was then and there possessed of a certain locomotive engine, with a certain train of cars then attached thereto, which said locomotive engine and train were then and there under the care and management of divers then servants of the defendant, who were then and there driving the same upon and along the said railroad, near and towards the crossing aforesaid: And while the plaintiff *with all due care and diligence*, was then and there riding in the said carriage across the said railroad, at the said crossing, upon the said public highway there, the defendant then and there, by its said servants, so carelessly and improperly drove and managed the said locomotive engine and train, that by and through the negligence and improper conduct of the defendant, by its said servants, in that behalf, the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said carriage, (*) and thereby the plaintiff was then and there thrown with great force and violence from and out of the said carriage to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, and divers bones of his body were then and there broken, and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto, during all which time he, the plaintiff, suffered great pain, and was hindered and prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was forced to, and did then and there lay out divers sums of money, amounting to — dollars, in and about endeavoring to be cured of his said wounds, hurts and bruises, occasioned as aforesaid; and also by the running and striking of the said train upon and against the said carriage as aforesaid, at the time and place in that behalf aforesaid, the said carriage, then of the value of — dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed and destroyed, and then and there became and was rendered of no use or value to the plaintiff.

(A count on the statute,¹ for not ringing a bell, etc., may be added, if deemed expedient—see form 328, concluding the declaration as follows:)

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of — dollars, and therefore he brings his suit, etc.

The words in italics, in the above form, would seem to be unnecessary. In Hazzard's case, 26 Ill. 373, the court says that "his (the plaintiff's) exercise of proper care, as well as the negligence of the defendant, should be alleged in the declara-

¹ Rev. Stat. (1893), 1116; Rev. Stat. (1895), 1200; 2 Starr & Curtis 1935; see *Hays v. Borders*, 1 Gilm. 46; *R. Co. v. Dillon*, 123 Ill. 570; *Id. v.*

Slater, 139 Ill. 193; *Id. v. Tutwiler*, 16 Ill. App. 199; *Id. v. Jemine*, 16 Ill. App. 212; *Id. v. Felton*, 24 Ill. App. 376.

tion;" but in *Simmons' case*, 38 Ill. 242, this is said to have been *dictum* merely; and the precedents given in the books do not contain any such allegation.

It is a well settled rule that the pleader is required to set out the particular facts constituting the negligence complained of only so far as they appear to be properly within his knowledge.¹ Where the act upon which the negligence is predicated is of a simple character, an allegation of an absence of care in its performance becomes reasonably intelligible, and hence it is not necessary to specify in a declaration the acts of omission or commission which constituted the negligence of the defendant, which is the basis of the action.²

A railroad company and a traveler on the highway have correlative rights, and each must use proper caution where there is a danger of a conflict; neither has a superior right, except as it results from the difficulties and necessities of the case.³ There is no distinction between railroads and ordinary highways in regard to the degree of care which the law requires on the part of those who have the direction or management of vehicles upon them.⁴

A railroad company is responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction and control, although the train belongs to another company. It has been held in Massachusetts that if such injury results from the negligence of another railroad company which has a joint right with the defendant to use the defendant's track, under a lease from the defendant, and which is accordingly running trains over the defendant's road on its own account, the defendant is not responsible.⁵ In Illinois it

¹ *Young v. Lynch*, 66 Wis. 514; *R. R. Co. v. Van Horne*, 38 N. J. L. 133; *R. R. Co. v. Jennings*, 157 Ill. 274.

² *R. R. Co. v. Jennings*, 157 Ill. 274; *Id. v. Van Horne*, 38 N. J. L. 143; *Id. v. Keiley*, 23 Ind. 133; *Clark v. R. R. Co.*, 28 Minn. 69; *Hawker v. R. R. Co.*, 15 W. Va. 628; *Berns v. Coal Co.*, 27 W. Va. 285; *R. R. Co.*

v. Hixon, 110 Ind. 225; *Fitts v. Waldeck*, 51 Wis. 567.

³ *R. R. Co. v. Dill*, 22 Ill. 265; *Walker v. Herron*, 22 Texas 55; *Dascomb v. R. R. Co.*, 27 Barb. (N. Y.) 221; see *R. R. Co. v. Geddis*, 33 Ill. 304.

⁴ *Beers v. R. R. Co.*, 19 Conn. 566; 2 Amer. R. R. Cas. 117.

⁵ *Fletcher v. R. R.*, 1 Allen 9.

is held that a railroad company can not release itself from liability by leasing its road to other parties; and that contractors for the construction of a railroad are the servants of the company, and for their tortious acts, while about the company's business, the company is liable.¹

It is negligence for a deaf person to drive an unmanageable horse across a railroad track when a train is approaching. It is his duty to keep a lookout and avoid the danger; and it is no excuse that the horse rushed upon the track near the crossing, or was driven there to avoid the engine.² But the fact that a person who was killed by a railroad train, at a crossing, was partially deaf, will not excuse the company for not having sounded the whistle, or rung the bell, from the point required by the statute.³

Persons crossing a railroad track are bound to know that such an undertaking is dangerous, and they must take all proper precautions to avoid accidents in so doing, or they can not recover for injuries received.⁴ Where a drunken man was driving towards a railroad, while a train was coming, in full view, and notwithstanding the shouting of persons within hearing distance, he attempted to cross the track and was injured, it was held that he could not recover for injuries received.⁵

The proprietors of railroads, when running their engines over crossings, are bound to exert reasonable care and diligence to prevent injury therefrom to travelers on the road crossed; and whether such care and diligence have been em-

¹ *R. R. Co. v. Whipple*, 22 Ill. 106; *R. R. Co. v. McCarthy*, 20 Ill. 385; *Ry. Co. v. Dunbar*, 20 Ill. 623; see *Hinde v. Nav. Co.*, 15 Ill. 72; *Leshner v. Nav. Co.*, 14 Ill. 85; *R. R. Co. v. Kanouse*, 39 Ill. 272; *R. R. Co. v. Rumbold*, 40 Ill. 143.

² *R. R. Co. v. Buckner*, 28 Ill. 299; *R. R. Co. v. Goddard*, 72 Ill. 567; *R. R. Co. v. Bell*, 70 Ill. 102.

³ *R. R. Co. v. Triplett*, 38 Ill. 482; see *R. R. Co. v. McKean*, 40 Ill. 218; *R. R. Co. v. Harwood*, 80 Ill.

88; *Ry. Co. v. Zaffinger*, 107 Ill. 199; *Ry. Co. v. Clayberg*, 107 Ill. 644.

⁴ *R. R. Co. v. Gretzner*, 46 Ill. 74; *R. R. Co. v. Fears*, 53 Ill. 115; *R. R. Co. v. Sweeney*, 52 Ill. 325; see *R. R. Co. v. Middlesworth*, 43 Ill. 64; *R. R. Co. v. Baches*, 55 Ill. 380.

⁵ *Ry. Co. v. Riley*, 47 Ill. 514; see *R. R. Co. v. Robinson*, 8 Wright (Penn.) 175; *R. R. Co. v. Heilman*, 13 Wright (Penn.) 60; *Steves v. R. R. Co.*, 18 N. Y. 422; *Brooks v. R. Co.*, 25 Barb. 600; *R. R. Co. v. Hutchinson*, 47 Ill. 408.

ployed in a particular case, is a question of fact, to be decided by the jury upon all the circumstances.¹

A compliance with the provisions of a statute respecting the putting up of notices at railroad crossings, and the ringing of a bell when engines are passing over the same, will not exempt the proprietors of a railroad from their obligation to use reasonable care and diligence in other respects when running their engines over crossings, if the circumstances of the case render the use of other precautions reasonable.²

An omission to ring a bell or sound a whistle at a crossing of a public road, as required by the statute, is negligence *prima facie* on the part of a railroad company.³ For a case where suit was brought against a railroad company for injuries received by the plaintiff from the explosion of the boiler of one of the company's engines—such explosion being held evidence *prima facie* of negligence—see 49 Ill. 234, and 55 Ill. 194.

In what county suit may be brought.—By the statute of Illinois, "actions against a railroad company may be brought in the county where its principal office is located, or in the county where the cause of action accrued, and into or through which its road may run."⁴

No. 328. *On the statute,⁵ against railroad company, for not ringing bell, etc., at crossing, whereby plaintiff was injured, etc.*

(Commence as in last precedent.) For that whereas the defendant, on, etc., in etc., was the owner of and used and operated a certain railroad extending through a part of the county aforesaid, which said railroad then crossed a certain public highway there, to wit (*here describe the highway, by name, location or termini,*) at a certain place in the said public highway, (*here describe the place as nearly as may be*); and so being the owner of and using and operating the said railroad as aforesaid, the defendant then and there drove a certain locomotive engine upon and along the said railroad, up to, upon and across the said public highway, at the said crossing of the same and the said railroad; and in so doing no bell of at least thirty pounds'

¹ *Penna. Co. v. Conlan*, 101 Ill. 93;
M. F. Co. v. Abend, 107 Ill. 44.

² *Bradley v. R. R.*, 2 Cush. (Mass.)
539; 1 Am. R. W. Cases, 457; *R. R.*
Co. v. Baches, 55 Ill. 379.

³ *R. R. Co. v. Terhune*, 50 Ill. 151.

⁴ 2 Starr & Curtis, 1773; Rev. Stat.
(1895) 1155; Rev. Stat. (1893) 1071;

see *R. R. Co. v. Swearingen*, 33 Ill.
290; *R. R. Co. v. Williams*, 77 Ill.
354.

⁵ 2 Starr & Curtis 1935; Rev. Stat.
(1893) 1116; Rev. Stat. (1895) 1200;
R. R. Co. v. Damerell, 81 Ill. 450;
R. R. Co. v. Siltman, 88 Ill. 529.

weight, or steam whistle, placed on the said locomotive engine, was rung or whistled by the engineer or fireman thereof, at the distance of at least eighty rods from the said crossing, and kept ringing or whistling until the said crossing was reached by the said locomotive engine, but therein the defendant wholly failed, and made default, contrary to the form of the statute in such case made and provided: By means and in consequence of which default and neglect of the defendant, as aforesaid, the said locomotive engine then and there ran and struck with great force and violence upon and against a certain carriage, then and there drawn by a certain horse, in which said carriage the plaintiff was then *with all due care and diligence* riding upon the said public highway, at the said crossing; (*proceed in the same manner as in the last precedent, from the asterisk*).

By the common law and independent of the statute it is the duty of those having charge of a train to give notice of its approach at all points of known danger. Where the remedy by the statute is cumulative and differs from that given by the common law, and the relief given by the statute is sought, the pleader must manifest that purpose or intent by apt words of reference to the statute.¹

*No. 329. Against street railway company for improperly managing cable motor whereby plaintiff was injured.*²

(Commence as in precedent No. 327, ante.) For that whereas, the plaintiff on, etc., in etc., was riding in a certain carriage, then and there drawn by a certain horse, which was driven by plaintiff, upon and along — street, a public highway, in said city of —, and the defendant was then and there possessed of a certain motor or grip-car used by said defendant to propel certain passenger cars known as street cars along and on said — avenue by means of a wire rope or endless cable and the said motor car had then and there attached thereto, a train of said passenger cars, which said motor and train of said passenger cars were then and there under the care and management of drivers then servants of the defendant who were then and there driving the same upon and along the said — street at or near the intersection of — avenue and said — street in said city of — aforesaid, and while plaintiff *with all due care and diligence* was then and there riding in the said carriage, along and on the said — street at or near its intersection with said — avenue as aforesaid, upon the said public highway, the defendant then and there, by its said servants, so carelessly and improperly drove and managed the said motor and train of cars, that by or through the negligence, mismanagement and unskillfulness of the defendant, by its said servants, in that behalf, the said motor and train of cars then and there ran into and struck with great force and violence upon and

¹ *R. R. Co. v. Dillon*, 123 Ill. 570.

² See *R. R. Co. v. Jennings*, 157 Ill. 274.

against the carriage (*allege damages according to the facts—see precedents No. 327 and 328 ante*).

The driver of a cable or electric street car is governed by established rules. He must know how to manage the motor; he must not drive it at an unreasonable rate of speed; he must keep a reasonably careful lookout ahead and must respect the equal rights of others as to the use of the streets.¹

No. 330. Against a railroad company, for negligence in management of train whereby plaintiff, a passenger, was injured.

(Commence as in No. 327, ante.) For that whereas the defendant, on, etc., in, etc., was possessed of and using and operating a certain railroad extending through and from, etc., to, etc., in the county aforesaid, with certain trains of cars running thereon for the conveyance of goods and passengers, for reward; and the plaintiff, at, etc., aforesaid, then became a passenger in a certain train of the defendant, on the said railroad, to be carried, and was thereupon accordingly then carried, in the said train, from thence to, etc., aforesaid, for certain reward to the defendant in that behalf: And thereupon it then became and was the duty of the defendant, upon the arrival of the said train at, etc., aforesaid, to give the plaintiff an opportunity of safely alighting therefrom, and then and there to stop the said train a reasonable time to enable the plaintiff so to alight therefrom safely as aforesaid; yet the defendant did not regard its duty, or use due care, in that behalf, but on the contrary thereof, upon the arrival of the said train at, etc., aforesaid, on the day aforesaid, and while the plaintiff, *with all due care and diligence*, was then and there about to alight therefrom, the defendant carelessly and negligently caused the said train to be suddenly and violently started and moved, and thereby the plaintiff was then and there thrown with great force and violence from and off the said train to and upon the ground there; by means whereof, then and there, one of the legs of the plaintiff was broken, and one of his ankles was dislocated, and he was otherwise greatly bruised, hurt and wounded; and thereby the plaintiff was obliged to and did then and there lay out divers large sums of money, amounting to — dollars, in and about endeavoring to be cured of the said injuries so received as aforesaid; and also by means of the premises the plaintiff then and there became and was sick, lame and disordered, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain, and was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains and profits which he might and otherwise would have made and acquired: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.²

¹ *Ry. Co. v. Jennings*, 157 Ill. 274. *v. Cross*, 73 Ill. 394; *Id. v. Mumford*,

² See *R. R. Co. v. Hazzard*, 26 Ill. 97 Ill. 560; *Id. v. Wilson*, 63 Ill. 167; 373; *Id. v. Simmons*, 38 Ill. 242; *Id. v. Mills*, 105 Ill. 63; *Id. v. Arnol*,

As to the averment of due care and diligence on the part of the plaintiff, see the remarks under form No. 327, *ante*.

It has been held in a number of cases that it is negligence for a passenger to get on or off a train, of which the motive power is steam, while the cars are in motion.¹

The rule, however, is relaxed when applied to horse cars or street railways.²

*No. 331. Against a railroad company, for damage caused by fire from engine.*³

(Commence as in No. 327, *ante*.) For that whereas the plaintiff, on, etc., was the owner of — stacks of wheat, containing a large quantity, to wit, —, bushels of wheat, then on his farm in the township of —, in the county aforesaid; and the defendant was before that time and then possessed of and using and operating a certain railroad leading from, etc., to etc., and running through the plaintiff's said farm, and was also possessed of the land to the said railroad there appertaining; the same being a strip of land of about the width of one hundred feet, to wit, of the width of fifty feet on each side of the middle of the said railroad, and extending through the said farm: And although it was before that time and then the duty of the defendant to keep the said strip of land free from dry grass and weeds, so that fire from the locomotive engines and trains of the defendant, on the said railroad, would not by means of such dry grass and weeds spread and be communicated therefrom to the said farm of the plaintiff; yet the defendant, not regarding its duty, or using due care, in that behalf did not, nor would keep the said strip of land free from dry grass and weeds as aforesaid, but on the contrary thereof before that time negligently suffered large quantities of such dry grass and weeds to accumulate, and then negligently suffered the same to remain on the said strip of land; by means whereof fire then and there emitted and thrown from a certain locomotive engine and train of the defendant, on the said railroad, then and there ignited the said dry grass and weeds, and spread and was communicated from and by the same to and upon the said farm and the said stacks of wheat of the plaintiff, and thereby the said stacks of wheat, being then and there of the value of — dollars, were then and there consumed, and wholly lost to the plaintiff.

(*Second count.*) And whereas also the plaintiff, on the day aforesaid, was the owner of — other stacks of wheat, containing a large quantity,

144 Ill. 261; *Id. v. Cook*, 145 Ill. 551.

¹ *R. R. Co. v. Lutz*, 84 Ill. 598; *Id. v. Stratton*, 78 Ill. 88; *Id. v. Chambers*, 71 Ill. 519; *Id. v. Slatton*, 54 Ill. 133; *Id. v. Randolph*, 53 Ill. 510;

Id. v. Scates, 90 Ill. 586; *Id. v. Meixner*, 160 Ill. 320.

² *R. R. Co. v. Buck*, 93 Ind. 346; *Stoner v. Penn. Co.*, 98 Ind. 384; *R. R. Co. v. Meixner*, 160 Ill. 320, and cases there cited.

³ *R. R. Co. v. Corn*, 71 Ill. 493.

to wit, — bushels of wheat, then in a certain close of the plaintiff, in the township and county aforesaid; and the defendant was then and there possessed of and operating a certain other railroad extending along and adjoining the said close, and was then and there running divers locomotive engines on the last mentioned railroad; and while a certain locomotive engine of the defendant, and under its control, was then and there passing upon the same railroad, along the said close, divers sparks and brands of fire then and there escaped and were thrown from the same locomotive engine, by and through the mere carelessness and negligence of the defendant, and set fire to certain stubble then in the said close, and thereby fire spread and was communicated to the last mentioned stacks of wheat of the plaintiff, whereby the same stacks of wheat, being then and there of the value of — dollars, were then and there consumed, and wholly lost to the plaintiff.

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of — dollars, and therefore he brings his suit, etc.

The statute provides that in all actions for damages occasioned by fire communicated by a locomotive engine, the fact that the fire was so communicated shall be *prima facie* evidence to charge the defendant with negligence.¹

Evidence that the railroad company has used and operated the road for years, will sustain an averment in the declaration that the company is the owner of the road.²

A railroad company is required to use the same diligence in removing dry grass and weeds, and other combustible materials, from exposure to ignition by fire from trains, that a cautious, prudent man would use in respect to combustible materials on his own farm, if exposed to the same hazard from such materials.³

Where fire is communicated to a building, through the negligence of a railroad company, the owner can not recover for the loss of property or money which he could easily, and without danger, have saved from destruction.⁴

It is the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds, or other com-

¹ 2 Starr & Curtis 1949; Rev. Stat. (1893) 1122; Rev. Stat. (1895) 1206; see *R. R. Co. v. Spencer*, 149 Ill. 97; *Calaway v. Sturgeon*, 58 Ill. App. 159; *Bass v. R. R. Co.*, 28 Ill. 9; *R. R. Co. v. Pindar*, 53 Ill. 449; *Id. v. Gillham*, 39 Ill. 455; *Id. v. McClellan*, 42 Ill.

355; *Id. v. Corn*, 71 Ill. 493; *Id. v. Motherspaugh*, 71 Ill. 572.

² *R. R. Co. v. Mills*, 42 Ill. 407.

³ *R. R. Co. v. Mills*, 42 Ill. 407; *Ry. Co. v. Campbell*, 86 Ill. 443.

⁴ *Ry. Co. v. Pindar*, 53 Ill. 447.

bustible material, and for neglect they are liable to the person injured.¹

It is not negligence *per se* for a railroad company to suffer grass and weeds to accumulate on its road; the fact, however, is proper evidence for the jury, who may find negligence from it. Owners of lands contiguous to railroads are as much bound, in law, to keep their lands free from an accumulation of dry grass and weeds as railroad companies are; so where a fire is started on the company's land, and is communicated to fields adjoining, the negligence of such owner, in that respect, will be held to have contributed to the loss. And unless it appears that the negligence of the company is greater than that of such land owner, the latter can not recover for injuries thus arising.²

No. 332. *Against a railroad company on the statute³ for damages resulting from not fencing its road, etc.*

(Commence as in No. 327, ante.) For that whereas the defendant, before and on the — day of —, in the year 18—, in the county aforesaid, was a railroad corporation, and was possessed of *and using and operating* a certain railroad, extending through *a part* of the county aforesaid, the line of which said railroad then and there was, and for more than six months before that time had been, open for use; yet the defendant, not regarding the statute in such case made and provided, did not *before that time there erect and then and there maintain fences* on the sides of its said railroad suitable and sufficient to prevent *horses* from getting upon the said railroad; by means whereof and for want of such fences—*horses* of the plaintiff then and there strayed and went upon the said railroad, at a certain place where such fence was then necessary to prevent *horses* from getting upon the said railroad from the lands adjoining the same, and not where the said railroad then ran through uninclosed lands lying at a greater distance than five miles from any settlement, nor where the proprietors of the lands through which the said railroad then ran had then already erected fences, or agreed with *the defendant* so to do, nor at the crossing of any public road or highway, nor within the limits of any town, city or village; and the said *horses* so being on the said railroad there (to wit, at the place in that behalf aforesaid), a certain engine of the defendant, then driven

¹ Rev. Stat. (1895), 1199; 2 Starr & Curtis, 1933; Rev. Stat. (1893), 1115.

² *R. R. Co. v. Shamfelt*, 47 Ill. 497; *R. R. Co. v. Frazier*, 47 Ill. 505; *R. R. Co. v. Mills*, 42 Ill. 407; *R. R. Co. v. Munn*, 51 Ill. 78; *Ry. Co. v.*

Pindar, 53 Ill. 447; *R. R. Co. v. Simonson*, 54 Ill. 504.

³ 2 Starr & Curtis' Stat. 1927; Rev. Stat. (1893) 1115; Rev. Stat. (1895) 1199.

and governed by divers, then agents of the defendant, on the said railroad, then and there ran and struck upon and against the said *horses*, and thereby — of the said *horses*, each of the value of — dollars, were then and there killed, and wholly lost to the plaintiff, and the others of the said *horses*, each of the value of — dollars, were then and there greatly hurt, wounded and lamed, and became of no use or value to the plaintiff.

(*Second count, for not maintaining cattle-guards.*) And whereas also the defendant, before and on the day aforesaid, in the county aforesaid, was a railroad corporation, and was possessed of *and using and operating* a certain other railroad extending through a *part* of the county aforesaid, the line of which last-mentioned railroad then and there was, and for more than six months before that time there had been, open for use; yet the defendant, not regarding the statute in such case made and provided, did not *before that time there construct and then and there maintain cattle-guards*, suitable and sufficient to prevent *horses* from getting upon the same railroad, at a certain road crossing there before that time and then existing and established, to wit, at the crossing of the same railroad and a certain road (*describe the road by name, location, or termini and if it crosses the railroad more than once state the particular place;*) by means whereof, and for want of such cattle-guards, — other *horses* of the plaintiff then strayed and went upon the same railroad, from the said road crossing, and strayed and wandered along and upon the same railroad, beyond and near the said road crossing, (to wit, in the county aforesaid); and the last mentioned *horses* so being on the same railroad as aforesaid, a certain other engine of the defendant, then driven and governed by divers then agents of the defendant, on the same railroad, then and there ran and struck upon and against the same *horses*, and thereby — of the same *horses*, each of the value of — dollars, were then and there killed, and wholly lost to the plaintiff, and the others of the same *horses*, each of the value of — dollars, were then and there greatly hurt, wounded and lamed, and became of no use or value to the plaintiff.

(*A count at common law may be inserted, charging the injury to have been negligently and willfully done, and omitting all allegations in respect to fences and cattle-guards.*)

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of — dollars, and therefore he brings his suit, etc.¹

Since the passage of the act of 1855, railroad companies in Illinois are liable for injuries caused to cattle that stray upon their roads through want of the required fences or cattle-guards;² and the failure of a railway to comply with the stat-

¹ See *R. R. Co. v. Crawford*, 25 Ill. 529; *Id. v. Helm*, 27 Ill. 198; *Id. v. Mothland*, 30 Ill. 452; *Id. v. Bookless*, 55 Ill. 230.

² Rev. Stat. (1893) 1115; *R. R. Co. v. Neikirk*, 13 Bradw. 387; *Id. v.*

Hall, 88 Ill. 368; *Schertz v. Ry. Co.*, 107 Ill. 577; *Ry. Co. v. Schertz*, 12 Bradw. 304; *Id. v. Crawford*, 25 Ill. 529; *Id. v. Barton*, 80 Ill. 72; *Id. v. Gerber*, 82 Ill. 632; *Id. v. Woosley*, 85 Ill. 370.

ute, renders it liable, *prima facie*, for stock killed or injured by its agents, engines or cars.¹

In an action against a railroad company, under the statute, the plaintiff must show that the railroad has been open for use six months before the occurrence of the injury;² and that such injury was occasioned by the omission of the company to maintain a fence or cattle-guards at some place where the statute requires the same to maintained.³ The declaration need not allege that the place where, etc., was not a farm crossing, as the statute does not exempt the company from fencing its road at such crossings; and if the required bars or gate at a farm crossing were left down or open by some one, without the fault of the company, and thereby the animals got on the track and were injured, that is a matter of defense.⁴

Although the declaration must negative all the exceptions in the statute, the burden is not on the plaintiff to prove the averment that there was no contract between the company and the owner of the ground that the latter should build the fence at the place where the animal went upon the railroad.⁵ A town or village, within the meaning of the statute, is any assemblage of houses, for dwellings, or places of business, or both, whether situated on regularly laid out streets and alleys or not.⁶

Railroad companies, by force of the statute, are required to fence their roads with sufficient fences to turn cattle, and after erecting to keep them in repair; they are required to put in gates or bars at farm crossings, which are a part of the fence, and the duty to keep their fences in repair includes the duty of keeping the gates or bars securely closed, so as to prevent cattle from getting upon their roads at such place as well as at other points. And while these companies are not required to

¹ *R. R. Co. v. Brake*, 125 Ill. 393; *Id. v. Lynch*, 67 Ill. 149.

² *R. R. Co. v. Meisenheimer*, 27 Ill. 30; *Id. v. Jones*, 27 Ill. 41; *Ry. Co. v. Diehl*, 52 Ill. 441; *Id. v. Bacon*, 30 Ill. 347; *Id. v. Bookless*, 55 Ill. 230; *Id. v. Brake*, 125 Ill. 393.

³ *R. R. Co. v. Taylor*, 27 Ill. 207;

Id. v. Williams, 27 Ill. 48; *Id. v. Saunders*, 85 Ill. 288.

⁴ *R. R. Co. v. Helm*, 27 Ill. 198; *Id. v. Swearinger*, 33 Ill. 289; *Id. v. Buck*, 14 Bradw. 394; *Id. v. Sierer*, 13 Bradw. 261.

⁵ *R. R. Co. v. Bacon*, 30 Ill. 347.

⁶ *R. R. v. Williams*, 27 Ill. 48.

keep such a force of men on their roads that a breach in a fence would be seen and repaired as soon as made, still the law requires them to keep a force sufficient to discover and close such a breach within a reasonable time.¹

When a servant of the company went over the road at four P. M. Saturday, and found the fences in repair, and the next Monday morning he again passed over the road, and found that a fence had been recently broken, and cattle had got upon the track and been injured, it was held that the company showed due diligence, and was not liable for the injury to the cattle.² If a horse takes fright and runs away, and gets upon a railroad at a point where the company is bound to fence, and is killed upon the track, the fact that the fence or cattle-guard was insufficient at that point, will alone render the company liable. But if the horse, in its fright, gets upon the track by breaking a fence or leaping a guard which would be sufficient under ordinary circumstances, then the company will not be obliged to prove an absence of negligence in running the train, and will not be liable unless shown to have been guilty of carelessness or a willful commission of the injury.³

A good and sufficient fence is not merely one which will turn ordinary animals,⁴ but one which will turn animals which are to some extent unruly.⁵

It is gross negligence in an engine driver not to observe cattle upon or near the track, at a road crossing eighty or one hundred yards distant, when he could readily do so.⁶ It is gross negligence to drive a train of cars before the engine, at a high rate of speed, through a deep cut, toward a crossing at the end of the cut, without sounding the bell or whistle continuously for the distance required by the statute.⁷ If an animal is suddenly driven on the track by a dog, and there is

¹ *Ry. Co. v. Harris*, 54 Ill. 528; *Id. v. Barrie*, 55 Ill. 226; *Id. v. Saunders*, 85 Ill. 288.

² *R. R. Co. v. Swearingen*, 47 Ill. 206; see *Ry. Co. v. Barrie*, 55 Ill. 226; *R. R. Co. v. Hall*, 88 Ill. 368.

³ *R. R. Co. v. Utley*, 38 Ill. 410.

⁴ *R. R. Co. v. Utley*, 38 Ill. 410.

⁵ *Ibid.*

⁶ *R. R. Co. v. Cauffman*, 38 Ill. 424; *Id. v. Wren*, 43 Ill. 77; *Id. v. Barrie*, 55 Ill. 226.

⁷ *R. R. Co. v. Triplett*, 38 Ill. 482.

no fault on the part of the engine driver, the company will not be held liable.¹ While the failure of a railroad company to fence its road is negligence, it is also negligence on the part of the owner of horses to place them, with blind bridles on them, in a field through which an unfenced railroad passes. The owner has a right to place them in the field, but not so blinded as to render them incapable of avoiding danger. In such a case, whether the one party or the other has been guilty of the greater negligence, is a question to be determined by the jury.²

If a railroad company has erected and maintains sufficient fences and cattle guards, then it is not liable for injuries caused to cattle on its road, unless such injuries are caused by the negligent or willful act of the company.³

An omission to ring a bell or sound a whistle at a road crossing does not render a railroad company liable for an injury to animals, unless such ringing or sounding would have prevented the injury. Where a company is not bound to fence its road, it is only liable for injuries done to animals through wantonness or gross negligence.⁴

The trustees of a railroad company, if they do business in the name of the company, are liable to be sued in that name, and their property is liable for debts incurred while transacting business under that name.⁵

A railroad company can not free itself from liability by leasing its road to other parties. Contractors for the construction of a railroad are the servants of the company, and for their tortious acts, while about the company's business, the company is liable.⁶

The company owning a railroad not fenced as required by

¹ *R. R. Co. v. Wren*, 43 Ill. 77.

² *R. R. Co. v. Todd*, 36 Ill. 409; see *Id. v. Baches*, 55 Ill. 379.

³ *R. R. Co. v. Crawford*, 25 Ill. 529; see *Id. v. Goodwin*, 30 Ill. 117; *Id. v. Morthland*, 30 Ill. 451; *Id. v. Geddis*, 33 Ill. 304; *Id. v. Middlesworth*, 46 Ill. 494.

⁴ *R. R. Co. v. Phelps*, 29 Ill. 447;

Id. v. Baker, 47 Ill. 295.

⁵ *Wilkinson v. Fleming*, 30 Ill. 353.

⁶ *R. R. Co. v. Whipple*, 22 Ill. 106; see *Hinde v. Nav. Co.*, 15 Ill. 72; *Leshner v. Nav. Co.*, 14 Ill. 85.

law, and also the company using it, are liable for injuries done to cattle by the trains of the latter company.¹

No. 333. Against a railroad company, for causing death of person—Suit by administrator.

(*Title of court, etc., as in No. 327, ante.*) A. B. plaintiff, administrator of the estate of G. H., deceased, who died intestate, complains of the — railroad company, defendant, of a plea of trespass on the case: For that whereas the defendant, in the lifetime of the said G. H., to wit, on, etc., in, etc., was possessed of and using and operating a certain railroad extending through a part of the county aforesaid, and was also then and there possessed of a certain locomotive engine, with a certain train of cars then attached thereto, which said locomotive engine and train were then and there under the care and management of divers then servants of the defendant, who were then and there driving the same upon and along the said railroad, near and towards a certain crossing of the said railroad and a certain public highway there, (to wit, a certain public highway then leading from — to —;) And while the said G. H., *with all due care and diligence*, was then riding across the said railroad, at the said crossing, upon the said public highway there, in a certain wagon drawn by two horses, the defendant then and there, by its said servants, so carelessly and improperly drove and managed the said locomotive engine and train, that by and through the negligence and improper conduct of the defendant, by its said servants, in that behalf, the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said wagon, and thereby the said G. H. was then and there thrown with great force and violence from and out of the said wagon to and upon the ground there, and was thereby then and there killed. And the plaintiff avers that the said G. H. left him surviving one J., his widow, and one L., his son and next of kin, who are still living; and that by reason of the death of the said G. H. as aforesaid, the said J. has been and is deprived of her means of support, and the said L. has been and is deprived of his means of support and education.²

(*A count may be inserted, charging neglect to ring a bell, etc., like No. 328, ante.*)

To the damage of the plaintiff, as administrator as aforesaid, of — dollars, and therefore he brings his suit, etc. And the plaintiff brings into the court here the letters of administration to him granted by the county court of the county aforesaid, which give sufficient evidence to the court here of the grant of administration of the said estate to the plaintiff, etc.

This action is given, in Illinois, by the act of February 12, 1853.³ In order to recover, the plaintiff must allege in his dec-

¹ *R. R. Co. v. Kanouse*, 39 Ill. 272; *Id. v. Rumbold*, 40 Ill. 143; but see *Fletcher v. R. R. Co.*, 1 Allen (Mass.) 9.

² See *R. R. Co. v. Morris*, 26 Ill. 400; 10 Law & Eq. 439; 3 Duer 635.

³ 1 Starr & Curtis 1290; Rev. Stat.

laration, and prove, that the deceased left a widow or next of kin, to whom the damages can be distributed. There may be persons who have been for years separated from their families and kindred, and who in all probability would never return to them; and in case of the death of such persons, there would be no next of kin who could sustain any pecuniary loss thereby, because a continuance of their lives would have brought no pecuniary benefit to their kindred. The sole measure of damages is the pecuniary loss; nothing is to be allowed, by way of solace, for the bereavement.¹

When the death of a person is caused by the wrongful act, default, or negligence of another, and the act or neglect is such as would have entitled the former to maintain an action if death had not ensued, the wrongdoer is liable for damages, in an action to be brought in the name of the personal representatives of the deceased. Suit must be brought within two years.²

The action, under the statute, is to be brought by the executor or administrator of the deceased; and it is not limited to those cases where the deceased leaves a widow. Any money recovered by such action is not to be treated as a part of the estate of the deceased; creditors do not derive any benefit from it. It is to be distributed among those to whom the personal estate would go by law, in the absence of a will. Orphans may have redress, under this statute, where both parents are killed, and a husband for the loss of a wife.³ (But the hus-

(1893) 813; Rev. Stat. (1895) 861; see *Coal Co. v. Strawn*, 15 Bradw. 347; *Holton v. Daly*, 106 Ill. 131; *R. R. Co. v. Clayberg*, 107 Ill. 644.

¹ *R. R. Co. v. Harwood*, 80 Ill. 88; *Barley v. Chicago*, 4 Biss. 430; *Brady v. Chicago*, 4 Biss. 448; *R. R. Co. v. Moranda*, 93 Ill. 302; *Id. v. May*, 108 Ill. 288; *Furnan Co. v. Abend*, 107 Ill. 44; *R. R. Co. v. Morris*, 26 Ill. 400; *Id. v. Baches*, 55 Ill. 381; *Coal Co. v. Hood*, 77 Ill. 68; *R. R. Co. Brooks*, 81 Ill. 245; *Chicago v. Scholten*, 75 Ill. 468; *R. R. Co. v. Austin*, 69 Ill. 426.

² Rev. Stat. (1893) 812; Rev. Stat. (1895) 861; 1 Starr & Curtis 1290; *R. R. Co. v. Morris*, 26 Ill. 400; *Chicago v. Major*, 18 Ill. 349; *Id. v. Slotton*, 54 Ill. 133; *R. R. Co. v. Harwood*, 80 Ill. 88; *Hackett v. Smelsley*, 77 Ill. 109; *R. R. Co. v. O'Connor*, 77 Ill. 391; *Id. v. Becker*, 76 Ill. 25; *Id. v. Miller*, 76 Ill. 278; *Id. v. Durkin*, 76 Ill. 395; *Weick v. Landers*, 75 Ill. 93; *Chicago v. Scholten*, 75 Ill. 468.

³ *City v. Major*, 18 Ill. 349; *Id. v. Starr*, 42 Ill. 174; *Id. v. Porter*, 47 Ill. 66; *Kerr v. Forgue*, 54 Ill. 482; *R. R. Co. v. Whalen*, 19 Bradw. 116,

band is not in any sense next of kin to the wife, nor the wife to the husband.)¹

A child, four years old, fell into a water tank constructed by the city of Chicago, and was drowned. *Held*, that the father, as administrator, could maintain an action under the act which gives a remedy when the death of a person is caused by the wrongful act, default, or negligence of another.²

No. 334. Against a city, for permitting a sidewalk to remain out of repair whereby plaintiff was injured.

(*Title of court, etc., as in No. 327, ante.*) A. B., plaintiff, by E. F., his attorney, complains of the city of —, defendant, of a plea of trespass on the case: For that whereas the defendant, before and on, etc., was possessed and had control of a certain public sidewalk on a certain public street, called — street, in the said city, in the county aforesaid, and ought to have kept the same in good and safe repair and condition. Yet the defendant, not regarding its duty in that behalf, while it was so possessed and had the control of the said sidewalk, to wit, on the day aforesaid, there wrongfully and negligently suffered the same to be and remain in bad and unsafe repair and condition, and divers of the planks where-with the said sidewalk was laid to be and remain broken and unfastened, by means whereof the plaintiff, who was then and there passing along and upon the said sidewalk, then and there necessarily and unavoidably tripped and stumbled upon and against one of the said broken and unfastened planks of the said sidewalk, and was thereby thrown and fell to and upon the said sidewalk and the ground there, and thereby the right wrist of the plaintiff was then and there dislocated and broken, and he became sick, lame and disordered, and so remained for a long time, to wit, from thence hitherto, during all which time he thereby suffered great pain, and was hindered from transacting his business and affairs, and also, by means of the premises, was there obliged to and did lay out divers sums of money, amounting to — dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder. To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

Where the law imposes the duty upon a municipal corporation of keeping its streets in a safe condition for the use of the public, an action on the case will lie to recover damages

Id. v. O'Connor, 19 Bradw. 591; ² *Chicago v. Major*, 18 Ill. 349; *Id. v. Carey*, 115 Ill. 115; *Id. v. Chicago v. Starr*, 42 Ill. 174; see *Shacklett*, 10 Bradw. 404; *Id. v. City v. Porter*, 47 Ill. 66; *Herr v. Forgue*, 54 Ill. 482; *R. R. Co. v. Stumps*, 55 Ill. 367.

¹ *Townsend v. Radcliffe*, 44 Ill. 446;
2 Kent. Com. 136; see *Whiton v. R. R. Co.*, 2 Biss. 282.

occasioned by a neglect of such duty.¹ And such duty can not be shifted by the corporation upon a person who may be employed to perform it.²

If an individual constructs a hatchway in a sidewalk, he must respond for any damages resulting from his negligence to render it safe and free from danger. It is also the duty of the city to keep the streets and sidewalks in safe condition, and it will be liable for injury resulting from its neglect of duty in that respect. But should a recovery be had against the city in such case, the person whose neglect of duty caused the injury will be liable over to the city therefor.³

The measure of damages in an action against a municipal corporation, for negligence in not keeping its streets and sidewalks in good condition, is compensatory, unless the proof shows the injury complained of was willful, which is scarcely possible in the case of a corporation of that description.⁴

¹ *Springfield v. Le Claire*, 49 Ill. 476; *Lesh v. Wabash Co.*, 14 Ill. 85; *Hinde v. Wabash N. Co.*, 15 Ill. 72; *Browning v. Springfield*, 17 Ill. 143; *Scammon v. Chicago*, 25 Ill. 424; *Bloomington v. Bay*, 42 Ill. 503; *Severin v. Eddy*, 52 Ill. 189; *Decatur v. Fisher*, 53 Ill. 407; *City v. Cockrum*, 59 Ill. App. 540; *Clayburgh v. Chicago*, 25 Ill. 535; *Joliet v. Verley*, 35 Ill. 58; *Chicago v. Gallagher*, 44 Ill. 295; *Lacon v. Page*, 48 Ill. 499; *Chicago v. Johnson*, 53 Ill. 91; *Lovenguth v. Bloomington*, 71 Ill. 238; *Kepperly v. Ramsden*, 83 Ill. 357; *City v. Brown*, 12 Bradw. 122; *Chicago v. Keefe*, 114 Ill. 235; *Mansfield v. Moore*, 124 Ill. 136; *Rock Island v. Cuineley*, 126 Ill. 408; *Chicago v. Dalee*, 115 Ill. 386; *Joliet v. Graber*, 21 Ill. App. 622; *Sterling v. Merrill*, 124 Ill. 522; *Bloomington v. Annett*, 16 Ill. App. 202; *Hearn v. Chicago*, 20 Ill. App. 249; *McDanel v. Logi*,

143 Ill. 487; *Chicago v. Babcock*, 143 Ill. 358; *Bloomington v. Osterle*, 139 Ill. 120; *Village v. Johnson*, 52 Ill. App. 659; *Springfield v. Rosenmeyer*, 52 Ill. 302; *Senger v. Harvard*, 147 Ill. 304; *Streator v. Hamilton*, 49 Ill. App. 449; *Normal v. Gresham*, 49 Ill. App. 196; *Mt. Carmel v. Guthridge*, 52 Ill. App. 632; *City v. Scraggs*, 52 Ill. App. 551; *La Salle v. Porterfield*, 138 Ill. 114; *Smith v. McDowell*, 148 Ill. 51.

² *Springfield v. Le Claire*, 49 Ill. 476.

³ *Severin v. Eddy*, 52 Ill. 189; see *Pfau v. Reynolds*, 53 Ill. 212; *Chicago v. Gallagher*, 44 Ill. 295; *Chicago v. Stearns*, 105 Ill. 554; *Chicago v. Schmidt*, 107 Ill. 186; *Bloomington v. Chamberlin*, 104 Ill. 268; *R. R. Co. v. Rung*, 104 Ill. 641.

⁴ *Chicago v. Martin*, 49 Ill. 241; *Decatur v. Fisher*, 53 Ill. 407.

No. 335. Against defendant, for keeping uncovered a vault-hole in street, adjoining his premises, whereby plaintiff fell down, and was injured.

(*Title of court, etc., as in No. 327, ante.*) A. B., plaintiff, by E. F., his attorney, complains of C. D., defendant, of a plea of trespass on the case: For that whereas the defendant, before and on, etc., was the possessor and occupier of a certain messuage and premises, with the appurtenances, situate in the county aforesaid, and near to a certain common and public highway there, in which said highway there now is, and before and on the day aforesaid there was, a certain hole, opening into a certain cellar and vault of and belonging to the said messuage and premises of the defendant, to wit, in the county aforesaid: Yet the defendant, well knowing the matters aforesaid, while he was so the possessor and occupier of the said messuage and premises, with the appurtenances, and while there was such hole as aforesaid, to wit, on the day aforesaid, there wrongfully and unjustly permitted the said hole to be and continue, and the same then and there was so badly, insufficiently and defectively covered, that by means of the premises, and for want of a proper and sufficient covering to the said hole, the plaintiff, who was then and there passing in and along the said highway, then and there necessarily and unavoidably slipped and fell into the said hole, and thereby the left leg of the plaintiff was then and there broken, and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto, during all which time the plaintiff thereby suffered great pain, and was prevented from attending to and transacting his affairs and business; and also, by means of the premises, was obliged to and did pay out a large sum, to wit, the sum of — dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state, and an accident happened, the landlord was held liable.¹ So where the defendant had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg, the defendant was held liable.²

Where a clerk of a retail merchant went down into a cellar that was being excavated by the landlord of the merchant, to recover a lady customer's hat, and while there was injured by the falling of a wall, it was held that he could maintain an

¹ *Leslie v. Pounds*, 4 Taunt. 649; *v. Major*, 18 Ill. 349; *Hunt v. Hoyt*, 20 Ill. 544; *Pekin v. Newell*, 26 Ill.

² *Sly v. Edgley*, 6 Esp. 6; *Langher* 320; *Severin v. Eddy*, 52 Ill. 190.
v. Pointer, 5 B. & C. 559; see *City*

action against the person doing the work, for the injury received.¹

Every person must so use his own property as not to injure his neighbor; and if he fails so to do, through the want of reasonable care or skill on the part of himself or his servants, he is liable for injuries thereby sustained.²

An owner of land, who contracts with a skillful person to erect a building thereon, and who for that purpose surrenders the premises for the use of the contractor, is not, during the erection of the building, answerable in damages for an accident occurring to a stranger passing by. If the sufferer has any recourse, it is against the contractor, or the corporation within which the property is situated. The persons who may be accused of negligence, under such circumstances, are not the servants of the owner of the premises, but of the contractor.³

No. 335a. Against defendant for obstructing the natural flow of water, etc.

(Commence as in No. 335, ante.) For that whereas, on, to wit, etc., the plaintiff was and from thence hitherto has been, and still is lawfully possessed of the following described real estate, to wit (*here describe*); and the defendant was possessed of the following described real estate, to wit (*here describe*), which said last mentioned real estate of the defendant adjoined the real estate of the plaintiff above described on the *east* side thereof; that on, to wit, etc., the defendant wrongfully and unlawfully erected and built, and from that time until the commencement of this suit, maintained and continued a certain levee or embankment along the *west* side or line of his said real estate, which said levee or embankment was of great dimensions, to wit, of the width of *six* feet, and of the height of *two* feet, and was without sufficient openings therein to permit the free passage of water. That by reason whereof the flow of large quantities of rain water which naturally flowed upon, over and across the said premises of the defendant, was obstructed, and said water was diverted from its natural course, and ran and flowed in a different direction over and upon the said land and premises of plaintiff, and there remained, whereby the said land and premises of the plaintiff were greatly damaged and injured, and became and were and are wet, swampy, and to a great extent, unfit for cultivation, to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

¹ *Lamarter v. Wallbaum*, 45 Ill. 444.

² *Lamarter v. Wallbaum*, 45 Ill. 444; *R. R. Co. v. Middlesworth*, 46

Ill. 494; *R. R. Co. v. Phillips*, 49 Ill. 234; *City v. LeClaire*, 49 Ill. 476.

³ *Scammon v. City*, 25 Ill. 424; see *Mercer v. Jackson*, 54 Ill. 397.

If one connects a part of his own premises with a public sidewalk, he thereby invites the public to treat the part so connected as belonging to the sidewalk, and can not be heard to say that the whole is not a public way. In such case he must exercise due care to keep the premises in a reasonably safe condition. So, if a hole in a stone platform between a building and a street, open to the public use as a part of the street, is necessary to light the basement, and it can be made safe by a railing, or otherwise, it is the duty of the owner making the platform, to use ordinary care and diligence to make and keep such opening reasonably safe.¹

As a general rule, the occupant, and not the owner, is responsible for injuries arising from a failure to keep the premises in a proper state of repair.² But when premises are let with a nuisance upon them, by means of which the injury complained of is received, the owner or landlord will be liable.³

When a party comes into possession of land as grantee or lessee, with an existing nuisance upon it, he can not be held liable to an action for damages until he has been first notified to remove it.⁴

No. 336. Against proprietors of stage coach for negligence.

(Commence as in last precedent.) For that whereas the defendant, before and at the time of committing the grievances hereinafter mentioned, was the owner of a certain common stage coach, by him used and employed in carrying passengers from, etc., to etc., and divers other places, for hire and reward; and being such owner of the said stage coach, he, the defendant, on, etc., at, etc., aforesaid, received the plaintiff into the said coach as a passenger, to be safely conveyed thereby on a journey from, etc., aforesaid, to, etc., aforesaid, for a certain fare and reward to the defendant in that behalf; and by reason thereof the defendant ought carefully to have conveyed the plaintiff, by the said coach, on the said journey. Yet the defendant, not regarding his duty in that behalf, so carelessly and unskillfully conducted himself that by and through the negligence and default of the defendant and his servants, and for want of due care and attention to their duty in that behalf, the said coach afterwards, and while the same was

¹ *Tomle v. Hampton*, 129 Ill. 379.

² *Tomle v. Hampton*, 129 Ill. 379; *Stephani v. Brown*, 40 Ill. 428; *Gridley v. Bloomington*, 68 Ill. 47; *City v. Simpson*, 110 Ill. 294.

³ *Tomle v. Hampton*, 129 Ill. 379, and cases there cited,

⁴ *Angell on Water Courses*, Sec. 403; *Cooley on Torts*, 611; *Johnson v. Lewis*, 13 Conn. 303; *Graff v. Ankenbrandt*, 124 Ill. 51, and cases there cited.

conveying the plaintiff on the said journey, and before the arrival thereof at, etc., aforesaid, to wit, on the day aforesaid, in the county aforesaid, was overset and thrown down; by means whereof the plaintiff, then being therein, was greatly cut, bruised and wounded, and the left leg of the plaintiff was then and there broken and he became sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto, during all which time he, the plaintiff, thereby suffered great pain, and was prevented from attending to and transacting his affairs and business, and was also by means of the premises obliged to lay out, and did lay out, a large sum of money, to wit, — dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder; and also thereby the plaintiff was hindered and prevented from continuing his said journey, and was detained at a certain inn at —, for the space of — weeks, and during that time there incurred great expenses, amounting to — dollars, in and about his necessary support and maintenance. To the damage, etc.

Where a traveler in a public coach is injured by the carelessness of the driver, such carelessness is to be deemed negligence on the part of the owner, in a suit brought against him for damages.¹ As regards *passengers*, a stage coach proprietor is not liable for any personal injury they may sustain from the upsetting of the coach, etc., unless he, or his servants, be guilty of gross negligence, or unskillfulness in driving or providing horses, coach or harness, etc.;² but the breaking down or upsetting of the coach is said to be *prima facie* evidence of neglect.³

No. 337. Against defendant, for keeping a dog which bit plaintiff.

(Commence as in No. 335, ante.) For that whereas the defendant, on, etc., and from thence until and at the time of the damage and injury to the plaintiff as hereinafter mentioned, to wit, in the county aforesaid, wrongfully and injuriously did keep a certain dog, he, the defendant, during all that time well knowing that the said dog then was used and accustomed to attack and bite *mankind*; which said dog afterwards, and while the defendant so kept the same as aforesaid, to wit, on, etc., aforesaid, did there attack and bite the plaintiff, and did then and there greatly lacerate, hurt and wound one of the legs of the plaintiff, and thereby he, the plaintiff, then and there became and was sick, sore, lame and disordered, and so remained for the space of six months then next following, during all which

¹*Brown v. R. R. Co.*, 31 Barb. 385.

²*Company v. Rawlings*, 3 Bing. 71; *Sharp v. Grey*, 9 Bing. 457.

³*Christie v. Grigg*, 2 Campb. 79;

Jones v. Voorhees, 10 Ohio, 145;

Stokes v. Saltonstall, 13 Pet. 181;

McKinney v. Neil, 1 McLean, 540;

Maury v. Talmadge, 2 McLean, 157.

time he thereby suffered great pain, and was thereby then and there hindered and prevented from transacting his affairs and business; and also, by means of the premises, the plaintiff was thereby then and there put to great expense and charges, in the whole amounting to the sum of — dollars, in and about endeavoring to be cured of the said wounds, sickness, lameness and disorder so occasioned as aforesaid, and has been and is, by means of the premises, otherwise greatly injured and damnified. (*A count may be inserted, alleging that the dog "was of a ferocious and malicious disposition,"—and another count for not keeping the dog properly secured or fed.*) To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

If a person negligently keeps dogs, or other animals, which are known to him to be of a savage and ferocious disposition, he is accountable for all injury which they may do; and it is the duty of the owner of such animals to secure them from doing mischief.¹

It is in general necessary, in an action for an injury committed by a domestic or other animal not naturally inclined to commit mischief, to allege and prove that the owner previously had notice of the animal's mischievous propensity, or that the injury was attributable to some other neglect on his part.²

No. 333. For malicious prosecution.

(Commence as in No. 335, ante.) For that whereas the plaintiff now is a good and honest citizen of this state, and as such has always behaved himself, and has not ever been guilty, or until the time of the committing of the several grievances by the defendant, as hereinafter mentioned, been suspected to have been guilty of *larceny*, or of any other such crime, by means whereof the plaintiff, before the committing of the said grievances, had deservedly obtained the good opinion and credit of all his neighbors, and other worthy citizens of this State; yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in his aforesaid good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause the plaintiff to be imprisoned for a long space of time, and thereby to impoverish, oppress and ruin him, on, etc., in, etc., went and appeared before one E. F., Esq., then and there

¹ *Pickering v. Orange*, 1 Scam. 338; *Pickering v. Orange*, 1 Scam. 492; *Stumps v. Kelly*, 22 Ill. 140; *Norris v. Warner*, 59 Ill. App. 300; *Linck v. Scheffel*, 32 Ill. App. 19.

² 1 Chit. Pl. 70; *Keightlinger v.*

Egan, 65 Ill. 235; *Flansberg v. Basin*, 3 Bradw. 531; *Wormley v. Gregg*, 65 Ill. 251; *Spray v. Amerman*, 66 Ill. 309; *Mareau v. Vanatta*, 88 Ill. 132; *Norris v. Warner*, 59 Ill. App. 300.

being one of the justices of the peace in and for the county aforesaid, and then and there, before the said E. F., so being such justice as aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff with having *feloniously stolen a certain gold watch of the defendant*; and upon such charge the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said E. F., so being such justice as aforesaid, to make and grant his certain warrant, under his hand, for the apprehending and taking of the plaintiff, and for bringing the plaintiff before him, the said E. F., or some other justice of the peace in and for the said county, to be dealt with according to law for the supposed offense; and the defendant, under and by virtue of the said warrant, afterwards, to wit, on the day aforesaid, there wrongfully and unjustly, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be arrested by his body, and to be imprisoned, and kept in prison for the space of — hours then next following, and until he, the defendant, afterwards, to wit, on, etc., there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be carried in custody before the said E. F., so being such justice as aforesaid, to be examined before the said justice, touching the said supposed offense; which said justice having heard and considered all that the defendant could say or allege against the plaintiff touching and concerning the said supposed offense, thereupon then and there adjudged and determined that the plaintiff was not guilty of the said supposed offense, and then and there caused the plaintiff to be discharged out of custody, fully acquitted and discharged of the said supposed offense; and the defendant has not further prosecuted his said complaint, but has abandoned the same, and the said complaint and prosecution are wholly ended and determined.

(*Second count.*) And whereas also the defendant, further contriving and maliciously and wickedly intending as aforesaid, on, etc., aforesaid, in, etc., aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff with having committed a certain offense punishable by law, to wit, *larceny*; and upon such last-mentioned charge the defendant then and there falsely and maliciously caused and procured the plaintiff to be arrested by his body, and to be imprisoned, and to be kept in prison for the space of — then next following; at the expiration of which time he, the plaintiff, was there duly discharged and fully acquitted of the last-mentioned supposed offense.

(*Averment of damage, applicable to both counts.*) By means of which several premises, the plaintiff has been and is greatly injured in his credit and reputation, and brought into public scandal, infamy and disgrace, with and among all his neighbors, and other worthy citizens of this State, and divers of those neighbors and citizens, to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe, that the plaintiff has been and is guilty of *larceny*; and also the plaintiff has, by means of the premises, suffered great anxiety and pain of body and mind, and has been obliged to lay out, and has laid out, divers large sums of money, amounting to — dollars, in and

about the procuring of his discharge from the said imprisonment, and the defending of himself in the premises, and the manifestation of his innocence in that behalf, and has been greatly hindered and prevented, by reason of the premises, from following and transacting his affairs and business, for the space of —; and also, by reason of the premises, the plaintiff has been and is otherwise greatly injured in his credit and circumstances: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

The gist of this action is, that the prosecutor acted maliciously, and without probable cause. If there is no malice, or if there is probable cause, the action will not lie.¹

Probable cause is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.²

A defendant may give in evidence any facts which show that he had probable cause for prosecuting, and that he acted in good faith upon the ground of suspicion.³ Good faith is always an important subject of inquiry in an action of this kind.⁴

To enable a party to maintain this action, it is not essential that there should have been a trial by jury, and a verdict of acquittal rendered, upon the charge preferred against him,⁵ but it is essential to aver and prove that the charge upon which the plaintiff was arrested has been legally determined, in his favor, either by a trial or otherwise.⁶

¹ *Jacks v. Simpson*, 13 Ill. 702; *Leidig v. Rawson*, 1 Scam. 272; *McBean v. Ritchie*, 18 Ill. 114; *Ross v. Innes*, 35 Ill. 487; *Anderson v. Friend*, 85 Ill. 135; *Harpham v. Whitney*, 77 Ill. 32; *Barrett v. Spaid*, 70 Ill. 408; *Mitchinson v. Cross*, 58 Ill. 366; *Bourne v. Stout*, 62 Ill. 261; *Montross v. Bradsby*, 68 Ill. 185; *McFarland v. Washburn*, 14 Ill. App. 369; *Low v. Greenwood*, 30 Ill. App. 184; *Wilmerton v. Sample*, 39 Ill. App. 62; *Lowry v. Hatley*, 30 Ill. App. 299; *Sundmacher v. Block*, 39 Ill. App. 553; *Neufeld v. Rodeminski*, 144 Ill. 83; *Schattgen v. Holnback*, 149 Ill. 646.

² *Richie v. McBean*, 17 Ill. 63;

Ross v. Innis, 35 Ill. 487; *Chapman v. Cauwrey*, 50 Ill. 512; *Angelo v. Faul*, 85 Ill. 106; *Palmer v. Richerson*, 70 Ill. 544; *Harpham v. Whitney*, 77 Ill. 32; *Brown v. Smith*, 83 Ill. 291; *Hess v. Webb*, 53 Ill. App. 53.

³ *Leidig v. Rawson*, 1 Scam. 272; *Richie v. McBean*, 17 Ill. 63; *Collins v. Hayte*, 50 Ill. 337; *Comstock v. Wood*, 50 Ill. 352.

⁴ *Comstock v. Wood*, 50 Ill. 352; see *Wagner v. Aultman*, 2 Bradw. 147; *Bishop v. Bell*, 2 Bradw. 551; *Splane v. Byrne*, 9 Bradw. 392.

⁵ *Gilbert v. Emmons*, 42 Ill. 143.

⁶ *Feazle v. Simpson*, 1 Scam. 30; *Hurd v. Shaw*, 20 Ill. 354; *Walker*

And where a plaintiff showed a discharge under a *habeas corpus*, it was held that it should also have been made to appear on the trial that the state's attorney did not send the case, with the witnesses, before the grand jury, or, if he did so, that no further steps had been taken by the people.¹

If an attorney commences an action against a party when he knows that his client has no cause of action, but with some sinister view, for some purpose of his own, he will be liable therefor.²

Although a want of probable cause may raise the presumption of malice, the existence of malice is not sufficient to raise a presumption of want of probable cause. The want of probable cause must be shown.³ It is for the plaintiff to show that the defendant had not probable cause or reasonable ground for prosecuting. Probable cause is a mixed question of law and fact.⁴

Malice may be inferred from want of probable cause, but it does not follow, as a legal inference.⁵

Previous good character may be shown as one evidence of want of probable cause, and bad character may be shown as reason for probable cause. The discharge of the accused by the examining magistrate, is not sufficient evidence of the existence of want of probable cause; and any fact, such as the admission of the accused, which goes to disprove either want of probable cause or malice, is proper for the consideration of the jury, in an action for malicious prosecution.⁶

v. Martin, 43 Ill. 508; *Blalock v. Randall*, 76 Ill. 224; *Rothschild v. Meyer*, 18 Bradw. 284; *Roy v. Goings*, 112 Ill. 656; *Leyenberger v. Paul*, 40 Ill. App. 516; *Rosenberg v. Hart*, 33 Ill. App. 265; *Hibbard v. Ryan*, 46 Ill. App. 313.

¹ *Walker v. Martin*, 43 Ill. 508; *Poppers v. Miller*, 14 Bradw. 87; *Harpham v. Whitney*, 77 Ill. 32; *Krug v. Ward*, 77 Ill. 603.

² *Burnap v. Marsh*, 13 Ill. 535.

³ *Wade v. Walden*, 23 Ill. 425; *Angelo v. Faul*, 85 Ill. 106; *King v. Ward*, 77 Ill. 603; *Harpham v. Whit-*

ney, 77 Ill. 32; *Thompson v. Force*, 65 Ill. 370; *Montross v. Bradsby*, 68 Ill. 185; *Mitchinson v. Cross*, 58 Ill. 366; *Roy v. Goings*, 112 Ill. 656.

⁴ *Israel v. Brooks*, 23 Ill. 575; *Jacks v. Simpson*, 13 Ill. 701; *Brown v. Smith*, 83 Ill. 292; *Hirsch v. Feeney*, 83 Ill. 548; see *Wade v. Walden*, 23 Ill. 425; *Palmer v. Richardson*, 70 Ill. 544; *Calef v. Thomas*, 81 Ill. 478; *Angelo v. Faul*, 85 Ill. 106; *Schattgen v. Holnback*, 149 Ill. 646.

⁵ *Cartright v. Elliott*, 45 Ill. App. 458.

⁶ *Israel v. Brooks*, 23 Ill. 575;

It is not requisite that a crime shall have been committed before probable cause for an arrest can exist. An act may have been done which will create a belief of crime, but when the *animus* is shown with which the act was done, its character may be entirely changed.¹

The waiving of an examination before a magistrate, and giving bail for appearance at the circuit court, is not such an admission of guilt as will preclude the plaintiff from sustaining an action for a malicious prosecution. A discharge, by the prosecuting attorney, of the recognizance of the person accused, is the usual mode of terminating a prosecution in Illinois. A bill need not be ignored before such person may maintain an action for a malicious prosecution.²

If a private person takes part in an unlawful imprisonment of another by an officer, he becomes a principal in the act and is liable; but if he merely communicates facts or circumstances of suspicion to the officer, leaving him to act on his own judgment, he is not liable at all, in an action either for malicious prosecution, or false imprisonment.³

The mere "knowledge and consent" of one partner, as to an arrest, unaccompanied with his advice and co-operation, will not render him liable with his copartner in an action by the person arrested.⁴

The law upholds and favors prosecutions under the public laws of the land, and shields and protects parties instituting them in good faith and from proper motives. So, when a party consults with counsel of good standing, and lays before him fully the facts within the party's knowledge, and then acts in good faith and in the honest belief that the party charged is probably guilty of the criminal offense, he will not be held responsible, if it shall turn out that the party is not guilty.

If a criminal prosecution is instituted by a party maliciously

Thorpe v. Balliet, 25 Ill. 339; see *Ross v. Innis*, 35 Ill. 487; *Anderson v. Friend*, 85 Ill. 135.

¹ *Ross v. Innis*, 26 Ill. 259; *McDavid v. Blevins*, 85 Ill. 238; see *Krug v. Ward*, 77 Ill. 603; *Davie v. Wisher*, 72 Ill. 262.

² *Schoonhover v. Meyers*, 28 Ill. 308.

³ *Brown v. Chadsey*, 39 Barb. 253; *Gilbert v. Emmons*, 42 Ill. 143.

⁴ *Gilbert v. Emmons*, 42 Ill. 143; *Rosenkrans v. Barker*, 115 Ill. 331; *Grund v. Van Vleck*, 69 Ill. 478.

and not in good faith upon the advice of legal counsel that a crime has been committed, he will be liable for a malicious prosecution, and the advice of counsel will not avail as a defense.¹

No. 340. For criminal conversation.

(Commence as in No. 335, ante.) For that whereas the defendant, contriving and wickedly intending to injure the plaintiff, and to deprive him of the society and assistance of E. B., the wife of the plaintiff, and to alienate and destroy her affection for the plaintiff, on, etc., and on divers other days between that day and the commencement of this suit, in, etc., wrongfully and wickedly debauched and carnally knew the said E. B., then and there and still being the wife of the plaintiff; and thereby the affection of the said E. B. for the plaintiff was then and there alienated and destroyed, and also, by means of the premises, the plaintiff has from thence hitherto wholly lost and been deprived of the society and assistance of the said E. B., his said wife, in his domestic affairs, which the plaintiff during all that time ought to have had, and otherwise might and would have had: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

An action for *criminal conversation* may be maintained either in case, or trespass,² but it is in effect in case.³ A recovery against one party in an action for *crim. con.* is no bar to an action against another party for a similar injury.⁴

In such action the plaintiff must prove an actual marriage.⁵ A marriage license, issued in the State of Tennessee, with a certificate indorsed thereon by a justice of the peace, that he had solemnized the marriage, was held to have been properly admitted in evidence, the official character of the officer granting the license, and also that of the justice of the peace, being

¹ *Neufeld v. Rodeminski*, 144 Ill. 83; *Roy v. Goings*, 112 Ill. 662; *Schaltgen v. Holnback*, 149 Ill. 646; *Bliss v. Wyman*, 7 Cal. 257; *Ross v. Innis*, 35 Ill. 487; *Collins v. Hayte*, 50 Ill. 337; *Anderson v. Friend*, 85 Ill. 135; *Davie v. Wisher*, 72 Ill. 262; *Skidmore v. Bricker*, 77 Ill. 164; *Murphey v. Larson*, 77 Ill. 172; *Calef v. Thomas*, 81 Ill. 478; *Ames v. Snider*, 69 Ill. 376; *Anderson v. Friend*, 71 Ill. 475; *Brown v. Smith*, 83 Ill. 291; *Palmer v. Richardson*,

70 Ill. 544; *Lowenthal v. Streng*, 90 Ill. 74; *Nelson v. Danielson*, 82 Ill. 545; *Horne v. Sullivan*, 83 Ill. 30; *Leyenberger v. Paul*, 40 Ill. App. 516.

² *And. Steph. Pl.* 82, n.; *Yundt v. Hartrunft*, 41 Ill. 9.

³ *McFadzen v. Olivant*, 6 East 387; *Van Vacter v. McKillip*, 7 Blackf. 578.

⁴ 1 Camp. 415; 1 Chit. Pl. 77.

⁵ 4 Burr. 2057; *Phil. on Ev.* 206; *Selw. N. P.* 14, 16.

certified by the clerk, the keeper of the records, under his official seal, and the presiding justice having certified to the authority and official character of the clerk.¹

While the loss of service of the wife or daughter is the alleged ground of recovery, the injury to the family in its reputation, the mental anguish and distress which necessarily attend the transaction, are the real causes for the recovery. And though the husband be absent from home, he is still entitled to his wife's services in the nurture of his children, as well as to the setting of a virtuous example to them by her.²

In an action for criminal conversation, evidence that the plaintiff is ill tempered, and that before the illicit intercourse charged he and his wife lived unhappily together, and occasionally came to blows, is inadmissible in mitigation of damages;³ nor are the confessions of the wife, or the opinions of witnesses, as to her fondness for the defendant, admissible in evidence against him.⁴

No. 341. For debauching plaintiff's daughter, etc.

(Commence as in No. 335, ante.) For that whereas the defendant, contriving and wrongfully intending to injure the plaintiff, and to deprive him of the service and assistance of E. B., the daughter and servant of the plaintiff, on, etc., and on divers other days between that day and the commencement of this suit, in, etc., debauched and carnally knew the said E. B., then and there, and from thence hitherto, being the daughter and servant of the plaintiff; whereby the said E. B. there became pregnant and sick with child, and so remained for the space of nine months then next following, at the expiration whereof, to wit, on, etc., she, the said E. B., was there delivered of the child with which she was so pregnant as aforesaid: By means of which said several premises, she, the said E. B., from the day first above mentioned hitherto, there became and was unable to do or perform the necessary affairs and business of the plaintiff, so being her father and master as aforesaid, and thereby the plaintiff, during all that time, lost and was deprived of the service of his said daughter and servant; and also, by means of the several premises, the plaintiff was obliged to, and did necessarily, pay out divers sums of money, in the whole amounting to — dollars, in and about the nursing and taking care of the said E. B., his said daughter and servant, and in and about the delivery of the said child: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

¹ *King v. Dale*, 1 Scam. 513.

² *Yundt v. Hartrunft*, 41 Ill. 9.

³ *Van Vacter v. McKillip*, 7 Blackf. 578.

⁴ *McVey v. Blair*, 7 Ind. 590.

An action on the case may be sustained by a *father*, for the seduction of his daughter, without proving any actual loss of services; it is enough that the daughter be a minor, residing with her father, and that he has a right to claim her services.¹ Although the loss of service is the alleged ground of complaint, the injury to the family in its reputation, and the mental anguish and distress which necessarily attend the seduction, are the real grounds of recovery.²

It is said, however, that a parent, in that character merely, can not support an action for debauching or beating his daughter, and that such an action is only sustainable in respect to the supposed loss of service, some slight evidence of which must in general be adduced.³ And the action may be sustained, not only by a parent, but by a guardian, brother-in-law, master, or other person standing *in loco parentis* to the person seduced;⁴ and for the seduction of an adopted daughter.⁵

If the person seduced is a minor, the action will be sustained, whether she resided with the plaintiff or elsewhere at the time of the seduction, if she was legally under the control of, or might be required to perform service for the plaintiff.⁶

Criminal connection may take place between the sexes without seduction; and in a suit by the father for the debauching of his daughter, if seduction be not proved, damages should not be given for it.⁷

¹ *Hewitt v. Prime*, 21 Wend. 79; *Horketh v. Barr*, 8 Serg. & Rawle 36; *Mercer v. Walmsley*, 5 Harr. & J. 27; *Moran v. Daws*, 4 Cow. 412; *Clark v. Fitch*, 2 Wend. 459; *Grable v. Margrave*, 3 Scam. 373; *Anderson v. Ryan*, 3 Gilm. 583; *Robinson v. Burton*, 5 Harring. (Del.) 335; *Verry v. Watkins*, 32 Eng. C. L. 308; *Hollaway v. Abell*, 32 Eng. C. L. 528.

² *Yundt v. Hartrunft*, 41 Ill. 9; 1 Chit. Pl. 167; *Garretson v. Becker*, 52 Ill. App. 255.

³ *Dean v. Peel*, 5 East 45; *Weedon v. Timbrell*, 5 Term 360; *Bennett v.*

Alcott, 2 Term 168; *Doyle v. Jessup*, 29 Ill. 460; *Bayles v. Burgard*, 48 Ill. App. 371; *Garretson v. Becker*, 52 Ill. App. 255.

⁴ *Ball v. Bruce*, 21 Ill. 161; *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273.

⁵ *Irwin v. Dearman*, 11 East 23; *Maguinay v. Saudek*, 5 Sneed (Tenn.) 146.

⁶ *Ball v. Bruce*, 21 Ill. 161; *Boyd v. Byrd*, 8 Blackf. 113; *Bolton v. Miller*, 6 Ind. 362.

⁷ *Boyd v. Byrd*, 8 Blackf. 113; *Richardson v. Fouts*, 11 Ind. 466.

The daughter is a good witness;¹ and she can not be cross-examined as to illicit intercourse with other men; and evidence of a promise of marriage is not admissible; and the plaintiff can not call witnesses to the girl's good character, unless the defendant has by evidence attacked it.²

The damages are not to be measured by the loss of service, but may be exemplary;³ and expenses actually paid may be recovered.⁴ A verdict for eight hundred dollars, in an action for seduction, is not excessive.⁵ If in an action by a father for his daughter's seduction, her character for previous chastity is successfully impeached, the right of action is not defeated, but this proof goes only in mitigation of damages.⁶

No. 342. For deceit in obtaining goods on credit.

(Commence as in No. 335, ante.) For that whereas, on, to wit, etc., the plaintiff was possessed of certain goods of the value of — dollars, and the defendant then and there applied to the plaintiff to sell to him said goods upon a credit of — days from said date.

That for the purpose of inducing plaintiff to sell to him said goods upon said credit, the defendant falsely and fraudulently represented and stated to the plaintiff that he, the defendant was solvent: that he was worth in the neighborhood of the sum of — dollars; that his business was in good condition; that he had the sum of — dollars invested therein; that his stock was well worth the sum of — dollars; that he had goods, notes and book accounts due and owing to him to the amount of about — dollars: that his outstanding indebtedness did not exceed the sum of — dollars.

And plaintiff avers that on the faith of said representations and statements made by the defendant as aforesaid and relying implicitly upon the same and believing the same to be true, he, the plaintiff, sold to the defendant the said goods upon said credit of — days.

And plaintiff further avers that said statements and representations so made by the defendant as aforesaid were each and all of them utterly false and untrue at the time they were made and were at that time known by defendant to be false and untrue and that the same were made by said defendant with the fraudulent purpose of obtaining said credit as aforesaid

¹ 2 Stra. 1064; 2 Chit. Pl. 11 Am. Ed. 644, n.

² *Dodd v. Morris*, 3 Campb. 519; *Bonifield v. Massey*, 1 Campb. 460; *Doyle v. Jessup*, 29 Ill. 460; *State v. Bierce*, 27 Conn. 319; *Barey v. Kibbe*, 31 Barb. 273; *Shattuck v. Myers*, 13 Ind. 46; *Reed v. Williams*, 5 Sneed 580.

³ *Ball v. Bruce*, 21 Ill. 161; *Grable v. Margrave*, 3 Scam. 373.

⁴ 1 Stark. C. N. P. 287; *Doyle v. Jessup*, 29 Ill. 460.

⁵ *Doyle v. Jessup*, 29 Ill. 460.

⁶ *Reed v. Williams*, 5 Sneed (Tenn.) 580.

and for the purpose of obtaining the possession of said goods upon credit and without paying for the same; that at the time of the making of said statements and representations the said defendant was wholly insolvent and has so remained ever since, and that defendant was fully aware of that fact and knew when he bought said goods that he could not pay for the same as he agreed.

And plaintiff further avers that although the time at which said payment was to be made for said goods has elapsed the defendant has never paid the sum so agreed to be paid for said goods or any part thereof.

And so the defendant deceived and defrauded the plaintiff in the sum of — dollars and therefore he brings this suit, etc.

No. 343. For deceit in the warranty of a horse.

(Commence as in No. 335. ante.) For that whereas the plaintiff, on, etc., bargained with the defendant, at his request, to buy of him a certain horse at a certain price, to wit, the sum of — dollars; and that the defendant for the purpose of inducing the plaintiff to purchase said horse at said price then and there fraudulently and falsely warranted the said horse to be sound, and quiet in harness, whereas in truth and in fact the said horse was at the time of said warranty and sale thereof, unsound, unsteady, restive and ungovernable in harness, and has from thence hitherto so remained, which said facts were well known to the defendant at the time of the warranty by him of said horse as aforesaid. And plaintiff further avers that relying upon the warranty of the defendant as aforesaid he then and there purchased of the defendant the said horse and then and there paid to the said defendant the said sum of — dollars; and the plaintiff avers that the defendant by means of the premises, on the day aforesaid, there falsely and fraudulently deceived the plaintiff on the sale of the said horse as aforesaid and thereby the said horse afterward, to wit, on the day aforesaid, not only became of no use or value to the plaintiff but also then and there greatly kicked, injured and spoiled a certain other horse of the plaintiff of the value of — dollars; and thereby also the plaintiff was then and there put to great expense of his moneys, in the whole amounting to the sum of — dollars, in and about the feeding and taking care of and selling and disposing of the first mentioned horse; to the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

An action will lie for deceit and warranty in the sale of a horse, no matter what the consideration to be paid was, or whether it was paid down or not.¹ In an action on the case upon an express warrant, a *scienter* need not be alleged, nor, if alleged, need it be proved.²

¹ *Applebee v. Rumery*, 28 Ill. 280; *Schoenell*, 55 Ind. 101; *Cameron v. Eames v. Morgan*, 37 Ill. 260. *Mount* (Wis.), 56 N. E. Rep. 1091;

² *Williamson v. Allison*, 2 East 8 Am. & Eng. Enc. Law, 793, note. 446; 2 Chit. Pl. 681, n.; *Gregory v.*

See the observations and authorities under form No. 61, *ante*, in Assumpsit.

No. 344. For deceit in the sale of wool deceitfully packed and not merchantable, etc.

(Commence as in No. 335, *ante*.) For that whereas the plaintiff, on, etc., in, etc., bargained with the defendant to buy of him — pounds of wool, which was then and there packed and bound up into — parcels in the form and having the appearance of fleece wool; that the defendant then and there falsely, deceitfully and fraudulently and with the intention and for the purpose of inducing the plaintiff to purchase the same, warranted said wool and each and every parcel thereof to be fleece wool and to be packed and bound up fairly and without deceit, and to be good and merchantable, which said representations and warranty were, when made by the defendant as aforesaid, well known by him to be false and untrue; that the plaintiff relying upon the said representations and warranty of the defendant then and there purchased and the defendant then and there deceitfully sold the same to the plaintiff for the sum of — dollars, which said sum plaintiff then and there paid to the defendant. And the plaintiff avers that at the time and place of the said sale the said wool was deceitfully packed and bound up and that — parcels thereof were not fleece wool, but that the wool contained in those parcels was wool of much less value and not good and merchantable wool; of all which the defendant was then and there well knowing and so the defendant falsely deceived and defrauded the plaintiff to his damage of — dollars and therefore he brings his suit, etc.¹

To entitle a party to recover in an action for deceit, it must appear that the representations complained of were untrue; that they were material; that the party making them knew them to be false, and that the person seeking to recover relied on the statements as true and was induced to act upon them.²

A declaration which sets out the false representations, the knowledge of the defendant that they were false, their falsity in fact, the materiality of the representations, the reliance

¹ See 8 Went. 369; Ol. Prec. 414.

² *Wheeler v. Randall*, 48 Ill. 182; *Hiner v. Richter*, 51 Ill. 299; *Eames v. Morgan*, 37 Ill. 260; *Farwell v. Metcalf*, 61 Ill. 372; *Powers v. Wheeler*, 63 Ill. 29; *Gage v. Lewis*, 68 Ill. 604; *Noetting v. Wright*, 72 Ill. 390; *Ins. Co. v. Hogan*, 80 Ill. 35; *Tone v. Wilson*, 81 Ill. 529; *Merwin*

v. Arbuckle, 81 Ill. 501; *Bartlett v. Blaine*, 83 Ill. 25; *Schwabacker v. Riddle*, 99 Ill. 343; *McBean v. Fox*, 1 Bradw. 177; *Eudlong v. Cunningham*, 11 Bradw. 28; *Sherburne v. Tobey*, 19 Bradw. 618; *Wightman v. Tucker*, 50 Ill. App. 75; *Brown v. Lobdell*, 50 Ill. App. 559; *Emerson v. Brigham*, 10 Mass. 197.

upon them by the plaintiff and the consequent damage is sufficient.¹

When the vendor of goods has sued the purchaser in assumpsit for the value thereof, he may afterwards by leave of court change the form of action to one of case charging the defendant with fraud and deceit in the purchase of the goods and recover their value. A plaintiff is not confined to the form of action he may first adopt.²

*No. 344a. Against commissioners of highways for flooding land by a ditch, etc.*³

(Commence as in No. 335.) For that whereas the said plaintiff, heretofore and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto has been, and still is, lawfully possessed of certain lands and premises, with the appurtenances, situate in the county aforesaid, which said land and premises the said plaintiff, before and at the time as aforesaid, used and enjoyed, and of right ought to have used and enjoyed, and still of right ought to use and enjoy, to wit, in, etc.; nevertheless the said defendants, acting at the time aforesaid, and long before and hitherto have acted and still act, as commissioners of highways of the township of *Wilmington* in the county aforesaid, having the care and superintendence of the highways and bridges therein, contriving and unjustly intending to injure, prejudice and aggrieve the said plaintiff in the possession, use, occupation, and enjoyment of his said lands and premises, and to render the same incommodious and unfit for tillage, and of little or no use or value to the said plaintiff, whilst the said plaintiff was so possessed thereof and so used and enjoyed the same as aforesaid, to wit, on the day and year aforesaid, and in, etc., wrongfully and unjustly cut, dug and made, and caused and procured to be cut, dug, and made, a certain ditch, drain, trench, and channel, and wrongfully and unjustly built thereupon, made, and erected, and caused and procured to be built thereupon, made, and erected, a certain grade, embankment and repair near to the said lands and premises of the said plaintiff in so careless, negligent, and improper a manner, and kept and continued the said ditch, drain, trench and channel, and the said grade, embankment and repair, for a long space of time, to wit, from thence hitherto, that by reason thereof afterwards, to wit, on the day and year aforesaid and on divers other times afterwards, and before the commencement of this suit, divers large quantities of rain water, and surface water, and standing water, ran and flowed from the said ditch, drain, trench and channel, and from and along the said grade, embank-

¹ *Brown v. Lobdell*, 50 Ill. App. 559; *Pasley v. Frieman*, notes; *Smith's Lead. Cases*; *People v. Healy*, 128 Ill. 9.

² *Flower v. Brumback*, 131 Ill. 646.

³ *Tearney v. Smith*, 86 Ill. 392.

ment and repair, down to, upon, and against, and into the said lands and premises of the said plaintiff, and walls, banks, ditches, fences, soil and other parts thereof and therein being, and thereby greatly injured and damaged the said lands and premises of the said plaintiff, and the said fences, walls, banks, ditches, soil, and other parts thereof, and by reason of the premises the said lands and premises of the said plaintiff became and were and are wet, swampy, and less fit for use, occupation, and cultivation, and also, by reason of the premises, the rain water, surface water, and standing water aforesaid ran and flowed in a different direction or channel, and with much greater force and increased violence and impetuosity than it of right ought to have and otherwise would have done, unto and against the lands and premises of the said plaintiff, and the fences, banks, walls, soil, and other parts thereof as aforesaid, and undermined, washed away, damaged, and destroyed the said lands and premises of the said plaintiff, and the fences, banks, walls, soil, and other parts thereof, whereby the plaintiff has suffered great damage, to wit, etc.

E. F., Att'y for Pl'ff.

No. 344 b. For negligence in setting fire to a prairie.¹

(Commence as in No. —, ante.) For that whereas the plaintiff on, etc., at, etc., was and still is possessed of a certain tract of land, to wit: (*Here describe*) on which said land there was then — stacks of wheat in the sheaf; — stacks of barley in the sheaf; — stacks of oats in the sheaf, and — stacks of hay, the property of the plaintiff; and around which land there was a rail fence, of all which the defendant then and there well knew; yet the defendant, at the said time and place, wittingly, knowingly and intentionally kindled a fire on the prairie near to and adjoining the said premises of the plaintiff, and so negligently and carelessly watched and tended the said fire, that the same communicated with and extended into and upon the said premises of the plaintiff, and consumed the said described stacks of grain and hay, and the said fence, of great value, to wit, of the value of — dollars, to the damage of the plaintiff of — dollars, and therefore he brings suit, etc.

E. F., Att'y for Pl'ff.

No. 345. Against sheriff for taking insufficient sureties in replevin.

(Commence as in No. 335, ante.) For that whereas the plaintiff, on, etc., in, etc., was possessed, as of his own property, of certain chattels, to wit, (*here describe the property*) of the value of — dollars, and the defendant, on the day aforesaid, was sheriff of the said county; and the plaintiff, so of the said goods and chattels being possessed, and the defendant, so as aforesaid being sheriff of the said county, the duty of his said office not considering, but contriving and fraudulently intending the plaintiff of his goods and chattels aforesaid to deprive and defraud, on the day aforesaid, there by color of his office aforesaid, and under the pretense of a certain writ of

¹ *Burton v. McClellan*, 2 Scam. 434.

replevin, to him directed and delivered, the goods and chattels aforesaid, there being found, at the plaint of one J. R., pretending that the same goods and chattels were the property of him, the said J. R., and that the plaintiff had taken the said goods and chattels, and the same unjustly detained, against sureties and pledges, the goods and chattels aforesaid to be replevied from the possession of the plaintiff, and to be delivered to the said J. R., did cause and procure, without sufficient surety and pledges, or any sufficient surety had or taken, to prosecute the said suit and plaint of him, the said J. R., against the plaintiff, with effect and without delay, and to make a return of the said goods and chattels to the plaintiff, if a return thereof should be adjudged to him, and to save and keep harmless the said sheriff in making the said replevy, as according to the statute in such case made and provided, and the duty of his said office, and the tenor of the writ aforesaid, he ought to have done. And thereupon, on the same day aforesaid, the plaintiff was there summoned into the circuit court of the said county, to appear on, etc., to answer the said J. R. of a plea wherefore he, the plaintiff, took the goods and chattels aforesaid; and thereupon it was in such manner proceeded, that by the said court it was considered that the plaintiff should have a return of the said goods and chattels, to be delivered to him; which said judgment remains in full force and effect: And the plaintiff in fact says, that the goods and chattels aforesaid, to the said J. R., by reason of the said replevin so as aforesaid delivered, to places obscure and unknown were eloiigned, whereby they can not be returned or delivered to the plaintiff; and the plaintiff the goods and chattels aforesaid, by the occasion aforesaid, has wholly lost, and is without remedy: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.¹

If a sheriff fails to take a bond from the plaintiff, before replevying the property, or returns an insufficient bond, he is liable to pay to the party injured all damages which he may sustain in consequence of such neglect, to be recovered by an action on the case in the circuit court.²

See form No. 246, *ante*, and cases there cited.

No. 346. For overloading and immoderately driving a horse.

(Commence as in No. 204, *ante*.) For that whereas the plaintiff, on, etc., in, etc., had delivered to the defendant a certain horse of the plaintiff, of the value of — dollars, to drive from, etc., to, etc.; but the defendant, on the same day, in the county of — aforesaid, so grievously overloaded, and so immoderately and with such unreasonable swiftness drove the said horse, that the said horse there afterwards, on the same day, by means of such immoderate overloading and unreasonable driving, there died. To

¹ *Pearce v. Humphreys*, 14 Serg. (1895), 1257; 2 Starr & Curtis' Stat. & R. 23. 2014; *People v. Robinson*, 89 Ill.

² Rev. Stat. (1893), 1173; Rev. Stat. 159; *People v. Core*, 85 Ill. 248.

the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

Where a person hires a horse, he is bound to use it with moderation, and if he does not, and an injury is occasioned, he will be liable in case therefor.¹

A gratuitous bailee of a horse—a person who borrows the horse of another for use, without compensation—is bound to use extraordinary care. The expense incurred by the borrower for the keeping of the horse, is not such a compensation to the lender as changes the gratuitous character of the bailment.²

See the form of a Declaration in Assumpsit, *ante*, No. 69, and the authorities there cited.

No. 347. Against a physician, for neglect, etc., in treatment of plaintiff.

(Commencement as in No. 335, *ante*.) For that whereas the defendant, before and at the time of committing the grievances hereinafter mentioned in the county aforesaid, was exercising the profession of a physician, and the plaintiff, on, etc., and while the defendant was so exercising such profession, there retained and employed the defendant, as such physician, for reward, to attend and treat the plaintiff for the cure of the plaintiff of a certain sickness and malady under which he was then and there suffering; and thereupon the defendant, as such physician, then and there accepted such retainer and employment, and entered upon the treatment of the plaintiff in pursuance thereof, and continued such treatment for the space of — days then next following: Yet the defendant, not regarding his duty as such physician, during that time there so unskillfully and negligently conducted himself in that behalf, that by and through his want of skill and care the said sickness and malady of the plaintiff then and there became greatly increased and aggravated, and the plaintiff then and there underwent great and unnecessary anguish and distress, and became and was greatly disordered, reduced and weakened in body, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain, and was hindered and prevented from transacting his affairs and business; and also, by means of the premises, the plaintiff has been obliged to pay, and has paid, to divers other physicians, divers sums of money, amounting to — dollars, in and about endeavoring to be cured of his said sickness, malady and disorder: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.³

¹ *Newton v. Pope*, 1 Cowen 109; see *Bennett v. O'Brien*, 37 Ill. 250.

² *Bennett v. O'Brien*, 37 Ill. 250; see *Howard v. Babcock*, 21 Ill. 259.

³ 7 Ohio (part 2), 123; 2 Wils. 359; 1 H. Bla. 158; *Searl v. Prentice*, 8 East 348; *Hancke v. Hooper*, 32 Eng. C. L. 510.

When a person assumes the profession of a physician and surgeon, the law holds him responsible for any injury from a want of reasonable care, skill and diligence in his practice, unless the services rendered were gratuitous, in which case gross negligence will alone make him liable.¹ But the highest degree of care and skill is not required.² Where he does not profess to be a physician, however, nor to practice as such, and is merely asked his advice as a friend or neighbor, he does not incur any professional responsibility.³

No. 348. Against an attorney for negligence in prosecuting an action.

(Commence as in No. 335, ante.) For that whereas the defendant, before and at the time of committing the grievances hereinafter mentioned, in the county aforesaid, was following the profession of an attorney at law; and the plaintiff on, etc., and while the defendant was so following such profession, there retained and employed the defendant, as such attorney, for reward, to prosecute and conduct a certain action of *assumpsit*, in the — Court of the said county, at the — term then next following, at the suit of the plaintiff, against one E. F., for the recovery of a certain sum of money, to wit, —, dollars, which the plaintiff then claimed to be due him from the said E. F.; and thereupon the defendant, on, etc., aforesaid, there accepted such retainer, and entered upon such employment: Yet the defendant, not regarding his duty or his said retainer and employment, did not prosecute and conduct or manage the said action with due and proper care, skill and diligence, but on the contrary thereof prosecuted, conducted and managed the same in such a careless, unskillful and improper manner, and with such want of due and proper care, skill and diligence in that behalf, that the said action afterwards, to wit, on, etc., there became and was wholly abortive and of no avail, and the plaintiff then and there was forced to be, and he was then and there nonsuited; (or if a verdict was found against him, or otherwise, state the fact accordingly,) whereby the plaintiff was and has been hitherto not only hindered and prevented from recovering his said claim from the said E. F., but is likely to lose the same; and also has incurred and paid to the said E. F. a large sum of money, to wit, — dollars, for his costs and charges in and about his defense to the said action; and has also incurred the loss of and paid a large sum of money, to wit, — dollars, for the plaintiff's costs and charges in and about prose-

¹ *Ritchey v. West*, 23 Ill. 385; *McNevins v. Lowe*, 40 Ill. 209.

² *Holtzman v. Hoy*, 118 Ill. 534; *McNevins v. Lowe*, 40 Ill. 209; *Fisher v. Nicolls*, 2 Bradw. 484; *Quinn v. Donovan*, 85 Ill. 194; *Barnes v. Means*, 82 Ill. 379; *Kendall v. Brown*,

74 Ill. 232; *Utley v. Burns*, 70 Ill. 162; *Hilliard on Torts*, 225; *Moss v. Pardridge*, 9 Bradw. 490; *Sims v. Parker*, 41 Ill. App. 286.

³ *Ibid.*; *Fisher v. Nicolls*, 2 Bradw. 484; *Quinn v. Donovan*, 85 Ill. 194; *Albin v. Kinney*, 96 Ill. 214.

cuting and conducting the said action: To the damage of the plaintiff of — dollars, and therefore he brings his suit. etc.¹

An attorney at law who assumes to exercise the duties of his office in behalf of another, for hire and reward, will be held to employ in his undertaking a reasonable degree of care and skill; and if injury results to the client for the want of such a degree of reasonable care and skill, the attorney will be liable to the extent of the injury sustained.²

The question of negligence is one for the opinion of the jury.³

If diligence would have been ineffectual, the defendant must prove it.⁴ In such case he will be only liable for nominal damages.⁵

For further observations upon the liability of attorneys, see chapter entitled “Attorneys at Law,” *post*.

No. 349. *Against railroad company, as common carrier, for not delivering goods.*

(Commence as in No. 327, ante.) For that whereas the defendant, on, etc., was possessed of and using and operating a certain railroad, and was a common carrier of goods and chattels thereon for hire, to wit, from — to —; and the plaintiff on, etc., aforesaid, at, etc., aforesaid, caused to be delivered to the defendant, and the defendant then and there received of the plaintiff, — boxes, containing divers goods, to wit, (*specify the articles*) of the plaintiff, of the value of — dollars, to be safely and securely carried by the defendant, from — aforesaid to — aforesaid, and at the last-named place to be safely and securely delivered for. (*or “to,” as the case may be,*) the plaintiff, for certain reward to the defendant in that behalf: Yet the defendant did not safely and securely carry the said boxes and their contents aforesaid from — aforesaid to — aforesaid, and at the last-named place safely and securely deliver the same for (*or “to,” as the case may be,*) the plaintiff; but on the contrary thereof, by the negligence of the defendant and its servants in that behalf, the said boxes and their contents aforesaid, afterwards, to wit, on the day aforesaid, in, etc., aforesaid, became and were wholly lost to the plaintiff: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

¹ 2 Chit. Pl. (11 Am. Ed.) 669.

³ *Reece v. Rigby*, 4 B. & A. 202.

² *Stevens v. Walker*, 55 Ill. 151;

⁴ *Bourne v. Digg*, 2 Chit. Rep. 311;

Cox v. Livingston, 2 Watts & Serg.

see 1 Campb. 176; 2 Salk. 515;

103; *Fitch v. Scott*, 3 How. (Miss.)

Peake's Rep. 162.

316; *Gilbert v. Williams*, 8 Mass.

⁵ *Grayson v. Wilkinson*, 5 S. &

51; see *Walker v. Stevens*, 79 Ill.

M. 268; *Walker v. Goodman*, 21

193; *Hughes v. Ziegler*, 69 Ill. 38.

Ala. 647.

A second count, for not carrying within a reasonable time, may be framed from the second count in No. 70, *ante*, page 129.

A carrier is an insurer of the safe delivery of the goods to the person to whom they are consigned and can not escape liability on the ground that deception, imposition or fraud were resorted to by an impostor to obtain from the agent of the carrier the goods intrusted to his care.¹

The consignee is presumptively the owner of the goods transported by a carrier, and delivery to him without notice of different ownership discharges the carrier, but it is the duty of the carrier to ascertain whether a bill of lading was delivered to the shipper, and if so, to retain the property until demanded by one claiming thereunder.²

The acceptance by a carrier, for transportation, of goods marked to a place beyond the terminus of its own line, and its giving a receipt therefor, constitute a *prima facie* contract to carry and deliver at the point so marked.³

See observations upon the liability of common carriers, following precedent No. 71, *ante*, page 130, and the cases there cited.

No. 350. Against a seller of intoxicating liquors, on the statute ⁴*—Action by the widow of a physician, for causing his habitual intoxication and thereby his death, and the loss of her means of support, etc.*

(Commence as in No. 335, *ante*.) For that whereas the plaintiff, before and on, etc., in, etc., was the wife of one G. B., and so continued to be until the time of his death as hereinafter mentioned; and the said G. B., on the day aforesaid, and for a long time next preceding that day, there exercised the profession of a *physician*, and derived therefrom a large yearly income, to wit, the yearly sum of — thousand dollars, and was also possessed of moneys and property amounting in value to a large sum of money, to wit, the sum of — thousand dollars, and by means thereof was enabled to and did provide a comfortable and liberal maintenance as well for himself as for the plaintiff and for one H. B., then and still being the minor son of the said G. B. and the plaintiff: And on the day aforesaid, and on divers other days between that day and the death of the said G. B., the defendant there sold and gave intoxicating liquors to him, the said G. B., and thereby caused him, the said G. B., to become, and he during that time there was, habitually intoxicated; and so being habitually intoxicated, he, the

¹ *Ex. Co. v. Shearer*, 160 Ill. 215.

² *Bank v. R. R. Co.*, 160 Ill. 401.

³ *R. R. Co. v. Simon*, 160 Ill. 648.

⁴ *Starr & Curtis' Stat.*, 971; *Rev. Stat.* (1893), 613; *Rev. Stat.* (1895), 661.

said G. B., in consequence thereof, during the time last aforesaid, there wasted and squandered all his moneys and property, and became greatly impoverished, reduced, degraded and wholly ruined, as well in his mind and body as in his estate, and neglected and ceased to exercise or attend to the duties of his said profession, or any other calling or business whatsoever, or in any manner to earn or provide a livelihood for himself or the plaintiff, or their said minor son; [and also thereby the plaintiff, during that time, was there compelled to and did lay out divers sums of money, amounting to a large sum, to wit, — dollars, of her own moneys and earnings in and about the care, nursing and maintenance of the said G. B., and for medicines and the services of physicians for him, and in and about the maintenance of the plaintiff and her said minor son:] and in further consequence of the habitual intoxication of the said G. B. as aforesaid, so by the defendant caused as aforesaid, he, the said G. B., on, etc., there died: By means of which premises the plaintiff has been and is injured in her [property and] means of support, and deprived of the same [and has been and is compelled to support herself and her said minor son by her own labor]. Wherefore the plaintiff says that she is injured, and has sustained damage to the amount of — dollars; and by force of the statute in such case made and provided, an action has accrued to her to demand and have of the defendant that sum of money; and therefore the plaintiff brings her suit, etc.

No. 351. Against a seller of intoxicating liquors, and his landlord, on the statute,¹ for injury done by an intoxicated person.

(*Title of court, etc., as in No. 327, ante.*) A. B., plaintiff, by G. H., his attorney, complains of C. D. and E. F., defendants, of a plea of trespass on the case: For that whereas the said C. D., on, etc., in etc., in a certain building and premises by him then and there occupied, did sell and give intoxicating liquors to one L. M., and thereby caused the intoxication of him, the said L. M.; and the said E. F., before that time and then, being the *owner* of the said building and premises, and having knowledge that intoxicating liquors were to be sold therein, there permitted the occupation of the said building and premises by the said C. D.: and thereupon the said L. M., so being intoxicated, and in consequence thereof, then and there (*here set forth the wrongful act done by the intoxicated person, and the consequent damage, the same as in an action against such person*). Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of — dollars; and by force of the statute in such case made and provided, an action has accrued to him to demand and have of the defendants that sum of money; and therefore the plaintiff brings his suit, etc.

Section 9 of the “act to provide for the licensing of, and against the evils arising from the sale of intoxicating liquors, is as follows:

¹ 1 Starr & Curtis' Stat. 971; Rev. Stat. (1893) 613; Rev. Stat. (1895) 661.

"Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; * * and a married woman shall have the same right to bring suits, and to control the same and the amount recovered, as a *feme sole*; and all damages recovered by a minor, under this act, shall be paid either to such minor, or to his or her parent, guardian, or next friend, as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by any appropriate action in any of the courts of this state having competent jurisdiction."¹

This statute is held to be highly penal in its character, providing a right of action unknown to the common law, and should receive a strict construction.

An action by a wife, for injuries to her *person*, occasioned by the drunkenness of the husband, can not be sustained without showing an assault, or some actual violence, or some

¹ 1 Starr & Curtis 971; Rev. Stat., (1893) 613; Rev. Stat. (1895) 661; see *King v. Haley*, 86 Ill. 106; *Reed v. Thompson*, 88 Ill. 245; *Holmes v. Nooe*, 15 Bradw. 164; *Johnson v.*

Drummond, 16 Bradw. 641; *O'Halloran v. Kingston*, 16 Bradw. 659; *Flynn v. Fogarty*, 106 Ill. 263; *Lowry v. Coster*, 91 Ill. 182; *Bell v. Cassem*, 158 Ill. 45.

physical injury to the person or the health. Mental anguish, disgrace, or loss of society or companionship, constitute no element for the recovery of damages under the statute.¹

By the common law it is not a tort, for which an action lies, to either sell or give away intoxicating liquors, and such an act, at the common law, is not culpable negligence that will impose a legal liability for damages upon the vendor or donor of such liquor. The right to recover damages for such an act is purely statutory.²

Section 9 of the dram shop act does not apply to persons who are not directly or indirectly, or in any way to any extent, engaged in the liquor traffic; and the right of action therein given to one injured in her means of support, is not intended to be given against one who, in his own house, or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy or hospitality, and without any purpose or expectation of pecuniary gain or profit.³

It has been held that it was the intention of the legislature in the passage of the two sections to deal only with landlords and their property and those having a rentable interest in the buildings and premises that they could control at the time, and that it was not intended to include those who only have reversionary and contingent interests and who are not in any way responsible for the renting, control or disposition of the property.⁴

The two years statute of limitations does not apply to an action brought under section 9, chapter 43, of the dram shop act.⁵

Intoxication caused, in whole or in part, by several sales and by several persons, creates a joint liability, and each person, who, by sale or gift, contributes to such intoxication, may be sued jointly.⁶ In suits under section 9 of the dram shop act, the plaintiff may proceed against any and all persons jointly or severally who may have caused the intoxication in whole or in part, without reference to whether they have equally contributed to the injuries complained of. They stand

¹ *Freese v. Tripp*, 70 Ill. 496.

² *Cruse v. Aden*, 127 Ill. 231.

³ *Cruse v. Aden*, 127 Ill. 231.

⁴ *Castle v. Fogerty*, 19 Bradw. 442.

⁵ *O'Leary v. Frisby*, 17 Bradw. 553.

⁶ *O'Leary v. Frisby*, 17 Bradw. 553.

upon the same footing as persons engaged in a joint tort, each being liable for the entire damage.¹

To make a liquor dealer liable under the statute, he must create the very intoxication, habitual or otherwise, from which the injury follows. During the time the sales are going on, the party using the liquor must be contracting by the use of it, in whole or in part, the disease of which he afterwards dies.²

In an action by a widow to recover for an injury to her means of support by the death of her husband, occasioned by the sale to him of intoxicating liquors by the defendant, the jury may take into consideration in assessing her damages, not only the wages and earnings of her husband, but also the age and probable life of the husband till terminated by natural causes, together with all other facts and circumstances shown in evidence. In case of the husband's death, the loss to the wife's means of support is co-extensive with her life, and the general average of the husband's contributions can only be ascertained from proof of his wages and earnings, which furnish her means of support.³

If an intoxicated person fall into a stream and be drowned, or should go on a railroad track and be there run over by a locomotive and killed, by reason of being incapable of exercising proper caution or taking proper care of himself, the proximate cause of his death would be intoxication.⁴

In an action by a widow against a dram shop keeper and his lessor, to recover for an injury to her means of support, it is error for the court to so instruct the jury as to make the right of recovery depend upon the question whether the plaintiff has been injured in her means of support "by the sale or gift of intoxicating liquor" to her husband. Intoxication produced by the liquor sold or given, and not the mere gift or sale of the liquor, must be the cause of injury to the means of support. In such action, it is necessary for the plaintiff to show the sale or gift of intoxicating liquor to the deceased,

¹ *Buckworth v. Crawford*, 24 Ill. App. 603.

³ *Betting v. Hobbett*, 142 Ill. 72.

⁴ *Meyer v. Butterbrodt*, 146 Ill. 131.

² *Westphal v. Austin*, 41 Ill. App. 648.

and also to show intoxication resulting from the liquor so sold or given, and injury resulting from such intoxication.¹

In an action on the bond of a dram shop keeper by a widow, to recover damages for being deprived of her means of support by the sale of intoxicating liquors to her husband, causing his intoxication, the submission to the jury of the question of the giving of such liquors to the husband is not error, where the declaration alleges the giving as well as the sale of such liquors to him, and there is some evidence, though slight, of the gift of such liquor to the husband.²

The sureties on the bond are not liable to exemplary damages, but only for such actual damages as the party for whose use the action is brought may sustain either in person, property or means of support.³

Where a dram shop keeper continues to sell intoxicating liquors to a man in the habit of drinking to excess, in wanton disregard or defiance of the request and warning of the wife of the latter, in consequence of which the husband becomes intoxicated, and the wife is thereby actually injured in her means of support, the jury may, in an action by the wife, give her exemplary damages.⁴

Where saloon keepers, with knowledge that a person is in the habit of becoming intoxicated, and while he is in fact intoxicated, sell him liquor and he is killed in consequence of his intoxication, they will be liable to exemplary damages in an action against them by the widow of the person so losing his life.⁵

Where the action is brought for injury to a wife's *means of support*, it is not necessary to show that she has been at any time, in whole or in part, without present means of support. It is enough that the means of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life, and below what they would otherwise have been.

The rule of damages in such case should be, not the amount of loss occasioned to the husband's estate, but the diminu-

¹ *McMahon v. Sankey*, 133 Ill. 636.

² *Smith v. People*, 141 Ill. 447.

³ *Ibid.*

⁴ *McMahon v. Sankey*, 133 Ill. 636;
Wolf v. Johnson, 152 Ill. 210.

⁵ *Kennedy v. Sullivan*, 136 Ill. 94.

tion, if any, thereby resulting to the wife's means of present and future support. And the liability of the defendant, in such cases, is not confined to injuries resulting from drunkenness immediately, and during its continuance, but extends to injuries resulting from insanity, sickness or inability induced by intoxication.¹

Exemplary damages can not be awarded as a punishment in this action, for the reason the statute provides that the public shall avail itself of its punitive provisions, which are fines and imprisonment in the county jail; the penalty of imprisonment to be enforced by indictment.²

The following cases arising under the dram shop act may also be consulted.³

ACTION ON THE CASE FOR SLANDER, ETC.

Slander is the defaming of a man in his reputation, or rendering him an object of ridicule, by words spoken or written, from whence an injury in character, or property, or feeling, arises or may arise to him. Written or printed slanders are libels.

¹ *Mulford v. Clewell*, 21 Ohio St. 191; *Brannan v. Adams*, 76 Ill. 331; *Shugart v. Egan*, 83 Ill. 56; *Confrey v. Stark*, 73 Ill. 187; *McCann v. Roach*, 81 Ill. 213.

² See *Freese v. Tripp*, 70 Ill. 496.

³ *Roth v. Eppy*, 80 Ill. 283; *Hackett v. Smelsley*, 77 Ill. 109; *Horn v. Smith*, 77 Ill. 381; *McEvoy v. Humphrey*, 77 Ill. 388; *Reget v. Bell*, 77 Ill. 593; *Meidel v. Anthis*, 71 Ill. 241; *Emory v. Addis*, 71 Ill. 273; *Kellerman v. Arnold*, 71 Ill. 632; *Fentz v. Meadows*, 72 Ill. 540; *Keedy v. Howe*, 72 Ill. 133; *Confrey v. Stark*, 73 Ill. 187; *Brantigam v. White*, 73 Ill. 561; *Brannon v. Silvernail*, 81 Ill. 434; *Bates v. Davis*, 76 Ill. 222; *Schimmelfenig v. Donovan*, 13 Bradw. 47; *Kadgin v. Miller*, 13 Bradw. 474; *Cobb v. People*, 84 Ill. 511; *Lowrey v. Coster*, 91 Ill. 182; *People v. Crotty*, 93 Ill. 180; *Carroll*

v. People, 13 Bradw. 206; *Wright v. People*, 101 Ill. 126; *Moore v. People*, 109 Ill. 499; *Holmes v. Nooe*, 15 Bradw. 164; *Johnson v. Drummond*, 16 Bradw. 641; *O'Halloran v. Kingston*, 16 Bradw. 659; *Hart v. Duddleson*, 20 Ill. App. 618; *Aden v. Cruse*, 21 Ill. App. 391; *Murphy v. Curran*, 24 Ill. App. 475; *People v. Brumback*, 24 Ill. App. 501; *Mayers v. Smith*, 25 Ill. App. 67; *Cleaves v. Stanley*, 34 Ill. App. 341; *Hayes v. Waite*, 36 Ill. App. 399; *Campbell v. Magruder*, 39 Ill. App. 606; *Marshall v. Laughran*, 47 Ill. 29; *Westphal v. Austin*, 41 Ill. App. 648; *Lloyd v. Kelly*, 48 Ill. App. 554; *Hellmuth v. Bell*, 49 Ill. App. 626; *Lane v. Tippy*, 52 Ill. App. 533; *Brant v. McIntee*, 53 Ill. App. 467; *Hanewacker v. Ferman*, 152 Ill. 321; *Jury v. Ogden*, 56 Ill. App. 100; *Bell v. Cassen*, 56 Ill. 260.

With respect to verbal slander, actionable words are of two kinds: *first*, those actionable in themselves, without proof of special damage; *secondly*, those actionable only in respect to some actual consequential damage.

Words of the *first* description must impute the guilt of some offense for which the party, if guilty, might be indicted and punished by the criminal courts; such as calling a person a traitor, thief, or highwayman, or to say that he is guilty of perjury, forgery, murder, larceny, adultery, fornication, and the like; and although the imputation of guilt may be general, without stating the particulars of the pretended crime, it is actionable.¹

Words charging a person with having a disease, or distemper, which renders him unfit for society, are actionable in themselves.² An action can therefore be sustained for calling a man a leper;³ but charging another with *having had* a contagious disease is not actionable, as he will not on that account be excluded from society.⁴ A charge which renders a man ridiculous, and impairs his enjoyment of general society, and injures those rights of friendly intercourse and mutual benevolence which man has with respect to man, is also actionable.⁵

To charge unfitness in an officer, who holds an office to which profit or emolument is attached, either in respect to morals or inability to discharge the duties of the office, is actionable.⁶

To impute a want of integrity, or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business in which the party is engaged, is actionable;⁷ as to accuse an

¹ *Holt v. Schofield*, 6 Term 694; *Walton v. Singleton*, 7 S. & R. 449; *Shaffer v. Kintzer*, 1 Binn. 537; *Eckart v. Wilson*, 10 S. & R. 44; *Widrig v. Oliver*, 13 Johns. 124; *Martin v. Stillwell*, 13 Johns. 275; *Gosling v. Morgan*, 32 Penn. 273; *Wright v. Paige*, 36 Barb. 438; *Strauss v. Meyer*, 48 Ill. 385.

² Bac. Abr., Slander, b. 2.

³ Starkie on Slander, 97.

⁴ *Carslake v. Maple*, 2 Term 473;

Taylor v. Hall, 2 Str. 1189; Bac. Abr., Slander, b. 2.

⁵ *Holt* on Libel, 221; *Williams v. Holdredge*, 22 Barb. 396.

⁶ *Holt* on Libel, 207; Starkie on Slander, 100.

⁷ *Camp v. Martin*, 23 Conn. 86; *Sumner v. Utley*, 7 Conn. 257; *Carroll v. White*, 33 Barb. 615; *Nelson v. Borchenius*, 52 Ill. 236; *Storey v. People*, 79 Ill. 45; *Rearick v. Wilcox*, 81 Ill. 77; *Clay v. People*, 86 Ill. 147; *Clifford v. Cochrane*, 10 Bradw. 570.

attorney or artist of inability, of inattention, or want of integrity,' or charging a clergyman with being a drunkard.²

Of the *second* class are words which are actionable only in respect of special damage sustained by the person slandered. Though the law will not permit in these cases the inference of damage, yet when the damage has actually been sustained, the person aggrieved 'may support an action for the publication of an untruth,'³ unless the words are spoken in the assertion of a supposed claim;⁴ but if maliciously spoken, an action lies.⁵

The charge must be false.⁶ The falsity of the charge is to be implied until the contrary is shown.'

The slander must, of course, be published, that is, communicated to a third person; and if verbal, then in a language which he understands; otherwise the plaintiff's reputation is not impaired.⁸

To render words actionable, they must be uttered without legal occasion. On some occasions it is justifiable to utter slander of another; in others it is excusable, if done without express malice.⁹ It is justifiable for an attorney to use scandalizing expressions in support of his client's cause, and pertinent thereto.¹⁰ Members of congress and other legislative assemblies can not be called to account for anything said in debate.¹¹

¹ 3 Wils. 187; 2 Bl. 750.

² *McMillon v. Birch*, 1 Binn. 178.

³ 1 Lev. 53; 1 Sid. 79; 3 Wood. 210; *Straus v. Meyer*, 48 Ill. 385.

⁴ Com. Dig., Act. on Case for Def. D. 30.

⁵ 1 Roll. Abr. 36; *Craft v. Boite*, 1 Saund. 243; *Hartley v. Herring*, 8 Term 130; *Vicars v. Wilcox*, 8 East 1.

⁶ 5 Co. 125; *Cass v. Anderson*, 33 Vt. 182.

⁷ *Maitland v. Goldney*, 2 East 436; *Craft v. Boite*, 1 Saund. 242.

⁸ *Frank v. Kaminsky*, 109 Ill. 26; *Craft v. Boite*, 1 Saund. 242; *Sheffill v. Van Deusen*, 13 Gray 304.

⁹ Bac. Abr., Slander, D. 4.

¹⁰ *Brook v. Montague*, Cro. Jac. 90; *Hodgson v. Scarlett*, 1 B. & A. 232; — *v. Moore*, 1 M. & S. 284; *Harding v. Greening*, 1 Holt (N. P. 531; *Kean v. McLaughlin*, 2 Serg. & R. 469; *McMillan v. Birch*, 1 Binn. 178; *Swear v. Birch*, 4 Yeates (Penn.) 322; *Mower v. Watson*, 11 Vt. 536; *Shelfer v. Gooding*, 2 Jones' Law (N. C.) 175; *Hoar v. Wood*, 3 Met. 193; *Hastings v. Lusk*, 22 Wend. 410; *Marsh v. Ellsworth*, 36 How. (N. Y.) 532.

¹¹ Newell on Def. and Slan. 420.

Malice is essential to the support of an action for slanderous words, but malice is in general to be presumed until the contrary is proved.¹

The testimony of the hearers as to the sense in which they understood the words spoken, is admissible.²

In Illinois it is provided by statute that "if any person shall falsely use, utter or publish words which, in their common acceptation, shall amount to charge any person with having been guilty of fornication or adultery, such words so spoken shall be deemed actionable, and he shall be deemed guilty of slander. It shall be deemed slander, and shall be actionable, to charge any person with swearing falsely, or with having sworn falsely, or for using, uttering or publishing words of, to or concerning any person, which in their common acceptation amount to such charge, whether the words be spoken in conversation of and concerning a judicial proceeding or not."³

"In actions for slander or libel, an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury, on the whole case, find that such defense was made with malicious intent, and it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of testimony."⁴

Where the defense is that the statements made were privileged communications, it must be shown that the words were spoken at such time and under such circumstances as would negative the supposition of malice in using them.⁵

¹ *Bromage v. Prosser*, 4 B. & C. 247; *Craft v. Boite*, 1 Saund. 242, n. 2; *Weather v. Hawking*, 1 Term 111; *Sutton v. Johnson*, 1 Term 544; *Harman v. Tappenden*, 1 East 555; *Maitland v. Goldney*, 2 East 436; *McKee v. Ingalls*, 4 Scam. 30; *Harry v. Constantine*, 14 La. An. 795; *Gaul v. Fleming*, 10 Ind. 253; *Colby v. McGee*, 48 Ill. App. 294; *Gilmore v. Litzelman*, 41 Ill. App. 541.

² *Nelson v. Borchanius*, 52 Ill. 236; *Starkie on Slander*, 44.

³ 2 Starr & Curtis, 2284; Rev. Stat.

(1895) 1450; Rev. Stat. (1893) 1352; *Sanford v. Gaddis*, 13 Ill. 329; *Spencer v. McMasters*, 16 Ill. 405; *Wolbrecht v. Bumgarten*, 26 Ill. 291; *Harbison v. Shook*, 41 Ill. 141; *Flagg v. Roberts*, 67 Ill. 485; *Mitchell v. Milholland*, 106 Ill. 175; *Tunnel v. Ferguson*, 17 Bradw. 76.

⁴ 2 Starr & Curtis, 2286; Rev. Stat. (1895) 1450; Rev. Stat. (1893) 1353; *Hawver v. Hawver*, 78 Ill. 412; *Schmisseur v. Kreilich*, 92 Ill. 347.

⁵ *Elam v. Badger*, 23 Ill. 498; *Snyder v. Degant*, 4 Ind. 578; *Wright v.*

The law will imply malice in the uttering of slanderous words, and heat of passion does not rebut the malice thus implied;¹ but if a person provoke and excite such passion as results in the use of slanderous words, that fact should be considered in mitigation.² And it is no mitigation of the offense to show that the person slandered was quarrelsome.³

The pecuniary circumstances of the defendant may be given in evidence to the jury.⁴ An infant under ten years of age may maintain an action, by her next friend, for slanderous words charging her with theft.⁵ The defendant may show that he offered an explanation of the offensive words, if the explanation was a part of the same conversation, and before the same auditor, and the same subject was still under consideration or in dispute.⁶

Where the defendant pleaded not guilty, and filed with his plea a notice of justification, which was read to the jury, but after the plaintiff had closed his case was erased by leave of the court, it was held that such conduct might be considered by the jury in estimating the damage, and that the withdrawal of the notice did not render an instruction to that effect improper.⁷ In an action for slander, it is for the jury to determine, from all the circumstances, what damages ought to be given; and such damages are not necessarily confined to mere pecuniary loss or injury; and unless the jury acted from prejudice, partiality or corruption, the verdict should not be disturbed.⁸ A repetition of the words after the beginning of a suit

Paige, 36 Barb. (N. Y.) 438; see *Wharton v. Wright*, 30 Ill. App. 343.

¹ *Hosley v. Brooks*, 20 Ill. 115; *Hatch v. Potter*, 2 Gilm. 725; *Gaul v. Fleming*, 10 Ind. 253; *Hudson v. Garner*, 22 Mo. 423; *Hagan v. Hendry*, 18 Md. 177; but see *McKee v. Ingalls*, 4 Scam. 30; *Larned v. Buffinton*, 3 Mass. 553.

² *Freeman v. Tinsley*, 50 Ill. 497; *Miller v. Johnson*, 79 Ill. 58.

³ *Hosley v. Brooks*, 20 Ill. 115.

⁴ *Hosley v. Brooks*, 20 Ill. 115; *Forshee v. Abrams*, 2 Clarke (Iowa)

571; but see *Storey v. Early*, 86 Ill. 461.

⁵ *Stewart v. Howe*, 17 Ill. 71; *York v. Pease*, 2 Gray (Mass.) 282.

⁶ *Winchell v. Strong*, 17 Ill. 597; see *McKee v. Ingalls*, 4 Scam. 30; *Miller v. Johnson*, 79 Ill. 58.

⁷ *Beasley v. Meigs*, 16 Ill. 139.

⁸ *Spencer v. McMasters*, 16 Ill. 405; *Coleman v. Southwick*, 9 Johns. 51; 2 Stark. on Sland. 105; *Symonds v. Carter*, 32 N. H. 458; *Cramer v. Noonan*, 4 Wis. 231; see *McNamara v. King*, 2 Gilm. 432.

for slander may be considered by the jury upon the question of malice and in aggravation of damages.¹

In action by husband and wife for slander of the latter, it is not necessary to prove that the plaintiffs were husband and wife at the time the slander was uttered, if it appears that they were married when the suit was brought.²

Where a person, acting as constable, arrested another, and took from him a knife and other articles, and the arrested person accused him of theft, it was held that if the words spoken were understood to relate to the arrest, they were not actionable.³ To charge a person with pilfering is actionable.⁴

Where words which are actionable in themselves are not spoken under circumstances which render them privileged communications, the law will presume malice, which can not be rebutted under the general issue; and it is no defense to the party that he believed the words to be true.⁵

It is not actionable to charge a man with an intent to commit a crime. The word "thief" is not actionable, unless the defendant intended to impute a crime, which the law will presume if a contrary intent is not shown.⁶ It is said that if words are spoken in merriment or jest, without malice, they are not actionable;⁷ but it is otherwise where there is malice and intention to defame. Drunkenness is no excuse.⁸

In an action for slander, where the defendant does not justify, he may mitigate the damages in two ways only: first, by showing the general bad character of the plaintiff; second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge.⁹

¹ *Stowell v. Beagle*, 79 Ill. 525; *Halsey v. Stillman*, 48 Ill. App. 413; *Sheen v. Journal Co.*, 53 Ill. App. 267.

² *Spencer v. McMasters*, 16 Ill. 405.

³ *Ayers v. Grider*, 15 Ill. 37.

⁴ *Becket v. Sterrett*, 4 Blackf. 499.

⁵ *Gilmer v. Eubank*, 13 Ill. 271; *Gilmer v. Eubank*, 13 Ill. 321; see *Darling v. Banks*, 14 Ill. 46.

⁶ *McKee v. Ingalls*, 4 Scam. 30; *Miller v. Johnson*, 79 Ill. 58; *Stumer v. Pitchman*, 124 Ill. 250.

⁷ *McKee v. Ingalls*, 4 Scam. 30; but see 2 Stark. Ev. 464; 1 Hawks' Pl. Cr. 356.

⁸ *McKee v. Ingalls*, 4 Scam. 30.

⁹ *Regnier v. Cabot*, 2 Gilm. 34; *Young v. Bennett*, 4 Scam. 43; *Wetherbee v. Marsh*, 20 N. H. 561; *Fuller v. Dean*, 31 Ala. 654; *Bodwell v. Swan*, 3 Pick. 376; *Cooper v. Barber*, 24 Wend. 105; *Root v. King*, 7 Cow. 630; *Cole v. Grant*, 3 Harrison (N. J.) 327.

It is said that although the words spoken charge an offense to have been committed in another state, which is not punishable where the suit is brought, still they are actionable.¹ Words actionable at common law, spoken in one state, are actionable in another.²

If slanderous words are spoken, maliciously or not, with the belief that they are true, giving the name of the author of them does not mitigate the offense.³ So if a libel is published, and the name of the author given, the publication is, nevertheless, actionable.⁴

Words charging a person with having forged a deposition are actionable.⁵

And to charge one with being a thieving person, or to say of him that he stole and ran away, is actionable.⁶

To charge a man with ravishing a cow imports bestiality, and is actionable.⁷

The words, "I have said you stole the knife, and still say it," are actionable.⁸

To say that a woman is a whore, and to say that there is a rumor that she is such, are in legal contemplation equally slanderous.⁹

The terms "bitch" and "slut," when applied to a woman and taken in their common acceptance, are not actionable *per se*.¹⁰

To charge a man with having a venereal disease, and contracting marriage with that disease upon him, and communicating it to his wife, will not be actionable if the plaintiff immediately after his marriage had the disease in fact, even

¹ *French v. Creath*, Breese 31; *Johnson v. Dicken*, 25 Mo. 580; *Poe v. Grever*, 3 Sneed (Tenn.) 664.

² *Linville v. Earlywine*, 4 Blackf. 469; *Offutt v. Earlywine*, 4 Blackf. 460; *Afret v. Burch*, 1 Blackf. 400.

³ *Jones v. Chapman*, 5 Blackf. 88.

⁴ *Clarkson v. McCarty*, 5 Blackf. 574.

⁵ *Atkinson v. Reding*, 5 Blackf. 39.

⁶ *Alley v. Neely*, 5 Blackf. 200.

⁷ *Harper v. Delp*, 3 Ind. 225.

⁸ *Iseley v. Lovejoy*, 8 Blackf. 462.

⁹ *Kelley v. Dillon*, 5 Ind. 426; *Dai-ley v. Reynolds*, 4 Iowa 354; *Schmis-seur v. Kreilich*, 92 Ill. 347; *Elam v. Badger*, 23 Ill. 498; *Koch v. Heide-man*, 16 Bradw. 478; *Frank v. Kaminsky*, 109 Ill. 26; *Claypool v. Claypool*, 56 Ill. App. 17.

¹⁰ *Ruby v. Murphy*, 27 Ill. App. 394; *Claypool v. Claypool*, 56 Ill. App. 17; *K—— v. H——*, 20 Wis. 252; *Schurich v. Kallman*, 50 Ind. 336; *Logan v. Logan*, 77 Ind. 558.

though there may be proof that his wife, whom he married without knowing that she had the disease, communicated it to him.¹

To call a man a thieving puppy is actionable.²

To charge a person with having maliciously killed a domestic animal is actionable.³

Charges made in the due administration of justice are privileged, and slander and libel will not lie upon them.⁴

Matter contained in a pleading in a cause filed in due course of a judicial proceeding in a court of competent jurisdiction is privileged if pertinent to the matter in controversy;⁵ but when a party injects into a pleading defamatory language wholly irrelevant, he will be liable.⁶

Declarations for slander and libel.—In general, three things are to be attended to in framing a declaration for slander or libel: 1st, the statement of extrinsic facts or circumstances (where necessary,) by which the words become actionable; 2d, the *colloquium*, or averments that the libelous or slanderous matter relates to these extrinsic facts, and to the plaintiff; and 3d, connecting averments or innuendoes, by which such parts of the publication or words as want explanation are pointed or referred to the extrinsic facts which have been previously alleged.⁷

1st. As to the statement of extrinsic facts or circumstances. If the words themselves are a direct unequivocal charge, and *per se* import slanderous or libelous imputations, and point directly to the plaintiff, as that "A. B. has committed the crime of perjury," no extrinsic facts or circumstances need be averred. So where the meaning can be collected from the defendant's own words, no averment ought to be made as to the existence of any circumstances to which the defendant

¹ *Golderman v. Stearns*, 7 Gray (Mass.) 181.

² *Little v. Barlow*, 26 Geo. 423.

³ *Tottleben v. Blankenship*, 58 Ill. App. 47.

⁴ *Hibbard v. Ryan*, 46 Ill. App. 313; *Fagan v. Fries*, 30 Ill. App. 236.

⁵ *Strauss v. Meyer*, 48 Ill. 385.

⁶ *McLaughlin v. Cowley*, 127 Mass. 316; See *Ash v. Zwiatusch*, 159 Ill. 455.

⁷ *Young v. Gilbert*, 93 Ill. 595; see *Young v. Richardson*, 4 Bradw. 364; *Brown v. Burnett*, 10 Bradw. 279; *Hill v. Miles*, 9 N. H. 9.

might possibly allude; since it is now settled that it is perfectly immaterial to the maintenance of the action, whether the defendant invented the circumstances, or whether they really existed. Therefore, where the words are general, no explanation is necessary to render them more particular, if the words themselves impute a crime.¹

But if the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation, by reference to some extrinsic matter, to show that they are actionable, it must be expressly shown that such matter existed, and that the slander related thereto.²

Thus, at common law, if the defendant charged the plaintiff with false swearing, a *colloquium* of its being in a cause pending in a court of competent jurisdiction, and on a point material to the issue, is necessary.³ Under the statute of Illinois, however, words imputing false swearing are actionable, whether spoken in a conversation concerning a judicial proceeding or not.⁴

With respect to the allegation of extrinsic facts, in reference to which the words are actionable, care should be taken not to allege such facts too minutely, and not to allege more than is necessary, lest there should be a variance between the allegation and the proof; though if the objection to the proof relates to matters which may not only be taken distributively, but which neither bear essentially upon the libel or slander, nor affect its character, and enough is left to render it action-

¹ 1 Swan's Pr. 552; 1 Chit. Pl. 400-438; *Snyder v. Degant*, 4 Ind. 578; see *Harbison v. Shook*, 41 Ill. 141.

² 1 Chit. Pl. 400; *Hawkes v. Hawkey*, 8 East 427; *Roberts v. Camden*, 9 East 93; *Bell v. Byrne*, 13 East 554; *Case v. Buckley*, 15 Wend. 327; *Linnville v. Earlywine*, 4 Blackf. 469; *Brown v. Brown*, 2 Shepl. 317; *Haris v. Burley*, 8 N. H. 256; see *Strauss v. Meyer*, 48 Ill. 385.

³ *Blair v. Sharp*, Breese, 30; *Niven*

v. Munn, 13 Johns. 48; *Crookshank v. Gray*, 20 Johns. 344; *Hopkins v. Bedle*, 1 Caine 347; *Phillips v. Haeffer*, 1 Penn. 62; *Palmer v. Hunter*, 8 Mo. 512; *Sanderson v. Hubbard*, 14 Vt. 462; *Van Slyke v. Carpenter*, 7 Wis. 173; *Stancell v. Pryor*, 25 Geo. 40.

⁴ *Sanford v. Gaddis*, 13 Ill. 329; *Wolbrecht v. Bumgarten*, 26 Ill. 291; *Harbison v. Shook*, 41 Ill. 141; see *Elam v. Badger*, 23 Ill. 498.

able, the variance will be immaterial.¹ If the matter referred to is material, and affects the charge in such a manner that the omission of it would alter the character of the slander or libel, either in the degree in which it is charged to be injurious, or in the estimate of damages, the court will hold the plaintiff to strict proof.² But if the extrinsic facts are surplusage, so that the words alleged in the declaration are actionable, independently of the extrinsic facts and the *colloquium*, the variance will be unessential.³

2d. The *colloquium*, and averments connected therewith, show, *first*, (in an action for verbal slander,) that the defendant held a discourse, and usually that it was concerning the plaintiff; and *secondly*, that the slanderous words were spoken in the same discourse, (or the libelous words were published,) of and concerning the plaintiff; and if there is a previous statement of extrinsic facts or circumstances, it is also averred that the slanderous matter was spoken in such discourse, (or the libelous matter was published,) of and concerning the plaintiff.⁴

The *colloquium* always connects, by its averments, the plaintiff and the extrinsic facts and circumstances with the libelous or slanderous words set out in the declaration.

3d. The *innuendoes*. The office of the innuendoes is to explain such parts of the libel or slanderous words as are equivocal, obscure, or need explanation. And for this purpose, the innuendoes can only point out or refer to the extrinsic facts, etc., which have been previously alleged.⁵

¹ *McGregor v. Thwaites*, 10 Eng. C. L. R. 36; *Rex v. Wright*, 18 Eng. C. L. R. 162; 1 Swan's Pr. 553.

² *Rex v. Horne*, 2 Cowp. 672; *Rex v. Wright*, 18 Eng. C. L. R. 173; see 1 Chit. Pl. 401-403, and cases there cited.

³ *Jacobs v. Fyler*, 3 Hill (N. Y.) 572; *Harvey v. French*, 28 Eng. C. L. R. 514; 1 Swan's Pr. 553; see *Elam v. Badger*, 23 Ill. 498.

⁴ 1 Chit. Pl. 403; 1 Stark. on Slander (2d Ed.) 383; *Craft v. Boite*, 1 Saund. 242 b, n. 3; *Lindsay v. Smith*,

7 Johns. 359; *Gidney v. Blake*, 11 Johns. 54; *Milligan v. Thorne*, 6 Wend. 413; *Nestle v. VanSlyck*, 2 Hill. 282; *Sayre v. Jewett*, 12 Wend. 135; *Tenney v. Clement*, 10 N. H. 52; see *Patterson v. Edwards*, 2 Gilm. 720.

⁵ *Stone v. Clark*, 21 Pick. 51; *Sherwood v. Chace*, 11 Wend. 38; *Hopkins v. Beedle*, 1 Caine 347; *Crookshank v. Gray*, 20 Johns. 344; *Pratt v. Price*, 11 Wend. 127; *Dayton v. Rockwell*, 11 Wend. 140; *Gilman v. Lowell*, 8 Wend. 573;

These three parts of a declaration for a libel or slander have been referred to, because it is so common, in practice, to crowd into the innuendoes what should be averments in the introductory part of the declaration. The general rule, which should be ever kept in mind when framing a declaration for libel or slander, is this: that an innuendo can not extend or enlarge the sense of the words beyond their own meaning, unless something is put in the previous part of the declaration for the innuendo to explain. It can not in any case add or introduce new matter not previously stated. It can not supply the want of a proper *colloquium*, or of an averment of the introductory matter. The innuendo can simply explain what has been previously averred in the introductory part of the declaration, or in the *colloquium*, or other previous averments.¹

Great care is required in stating the words correctly; for the plaintiff must prove the exact words laid in the declaration, or enough of the same words to make out the slander. But it is sufficient to prove part only of any set of words alleged, if the proved part is itself intelligible and actionable, and the remainder is neither a qualification of the part proved, nor necessary to render the part proved intelligible.² It is not sufficient, however, to prove equivalent words of slander, or different words of the same import.³

McLaughry v. Wetmore, 6 Johns. 82; 1 Swan's Pr. 554; *Patterson v. Edwards*, 2 Gilm. 720; *Gault v. Babbitt*, 1 Bradw. 130; *Strader v. Snyder*, 67 Ill. 404; *Strauss v. Meyer*, 48 Ill. 385; *Nelson v. Borchsenius*, 52 Ill. 236; *McGregor v. Eakin*, 3 Bradw. 340; *Foval v. Hallett*, 10 Bradw. 268; *Clifford v. Cochrane*, 10 Bradw. 570; *Schmisser v. Kreilich*, 92 Ill. 347.

¹ Swan's Pr. 554; Cro. Car. 420; 1 Stark. on Slander (Wend. Ed.), 344; *Craft v. Boite*, 1 Saund. 243, n. 4; *Patterson v. Edwards*, 2 Gilm. 720; Townsend on Sland. and Lib., Sec. 335, and cases there cited; *Ulerly v. Stock Exch.*, 54 Ill. App. 233; *Fin-*

nell v. Walker, 48 Ill. App. 331.

² *Richards v. Baumgart*, 56 Ill. App. 422; *Keefe v. Voight*, 45 Ill. App. 620; *Sword v. Martin*, 23 Ill. App. 304; *Bihler v. Gockley*, 18 Ill. App. 496.

³ *Wallace v. Dixon*, 82 Ill. 202; *Schmisser v. Kreilich*, 92 Ill. 347; *Slocum v. Kuykendall*, 1 Scam. 187; *Patterson v. Edwards*, 2 Gilm. 720; *Sanford v. Gaddis*, 15 Ill. 228; *Norton v. Gordon*, 16 Ill. 38; *Wilborn v. Odell*, 29 Ill. 456; *Crotty v. Morrissey*, 40 Ill. 477; *Harbison v. Shook*, 41 Ill. 141; *Baker v. Young*, 44 Ill. 42; *Olmstead v. Miller*, 1 Wend. 510; *Birch v. Benton*, 26 Mo. 153; *Albin v. Parks*, 2 Bradw. 576; *Thomas v.*

With respect to variances from omissions (that is, omissions to allege in the count all the words spoken), it seems, in case of oral slander, to be sufficient to set out the words which are material, and it is not even necessary to state words which may qualify the objectionable ones.¹

An allegation spoken affirmatively will not be sustained by proof of words spoken interrogatively; nor will proof of words spoken to a person sustain a declaration which charges words spoken of a person.²

So, proof of words spoken in the second person, will not, it seems, support an allegation of words spoken in the third person;³ and words spoken as a rumor, or as the words of another, will not support words alleged unqualifiedly as the defendant's.⁴

Distinct sets of slanderous words, importing the same charge, and said to have been spoken at the same time, though in fact spoken at different times, may be put into the same count;

Fischer, 71 Ill. 576; *Sword v. Martin*, 23 Ill. App. 304; *Newell on Def. & Slander*, 804, 805, 808.

¹ *Stark on Slan.* 375; *Townsend on Slan. & Libel*, Sec. 265; *Sanford v. Gaddis*, 15 Ill. 228; *Norton v. Gordon*, 16 Ill. 38; see Illinois cases, *supra*; *Fox v. Vanderbeck*, 5 Cow. 513; *Nestle v. VanSlyck*, 2 Hill (N. Y.) 282; *Sunmer v. Utley*, 12 Vt. 257; *Scott v. McKinnish*, 15 Ala. 662; *Hancock v. Stephens*, 11 Humph. (Tenn.) 507; *Iseley v. Lovejoy*, 8 Blackf. 462; *Nye v. Otis*, 8 Mass. 122; *Whiting v. Smith*, 13 Pick. 364; *Pond v. Hartwell*, 17 Pick. 353; *Allen v. Perkins*, 17 Pick. 369; *Miller v. Miller*, 8 Johns. 74; *McClintock v. Crick*, 4 Iowa 453; *Wheeler v. Robb*, 1 Blackf. 330; *Berry v. Dryden*, 7 Mo. 324; *Coghill v. Chandler*, 33 Mo. 115; *Frank v. Kaminsky*, 109 Ill. 26.

² *King v. Berry*, 4 Term 217; *Sanford v. Gaddis*, 15 Ill. 228; *Miller v. Miller*, 8 Johns. 74; see *McConnell*

v. McCoy, 7 Serg. & Rawle 223; *Patterson v. Edwards*, 2 Gilm. 720; *Slocumb v. Kuykendall*, 1 Scam. 187; *Berry v. Dryden*, 7 Mo. 324; *Watson v. Musick*, 2 Mo. 29; *Linville v. Earlywine*, 4 Blackf. 469; *Creelman v. Marks*, 7 Ib. 281; *Williams v. Bryant*, 4 Ala. 44; *Easley v. Moss*, 9 Ib. 266; *Fox v. Vanderbeck*, 5 Cow. 513; *Olmstead v. Miller*, 1 Wend. 506; *King v. Whitley*, 7 Jones (N. C.) L. R. 529; *Wilborn v. Odell*, 29 Ill. 456; *Stees v. Kenible*, 27 Penn. St. 112; *Lancaster v. Hewson*, 2 M. & R. 176; *Pasley v. Kemp*, 22 Mo. 409; 2 Stephens' N. P. 2576; *Coleman v. Playsted*, 36 Barb. (N. Y.) 26.

³ *King v. Berry*, 4 Term 217; *McConnell v. McCoy*, 7 Serg. & Rawle 223; *Wolf v. Rodifer*, 1 Har. & J. 409; *Miller v. Miller*, 8 Johns. 74; but see *Cro. Eliz.* 503; *Tracy v. Hankins*, 1 Binn. 395, n.; *Huffman v. Shumate*, 4 Bibb (Ky.) 515.

⁴ *Bell v. Byrne*, 13 East 554.

and if any one of the sets is sustained by proof, the plaintiff is entitled to a verdict on the set proved.¹

Where slanderous words are uttered in a foreign language, the declaration should set out the words in that language, with a translation.²

An averment of words spoken in English will not be supported by evidence of words spoken in a foreign language.³

The place of the offense is not material; like a date it may be proven differently from that alleged, and it is not necessary that the place be stated under a *videlicet*.⁴

No. 352. General form of declaration for slander.

(Commence as in No. 335, ante.) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this state: Yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in the county aforesaid, in a certain discourse which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of those persons, spoke and published, of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, that is to say, "He, etc., (*setting out the words, with proper innuendoes, etc, as in No. 354, post.*)

Second count.—And afterwards, to wit, on, etc., aforesaid, in, etc., aforesaid, in a certain other discourse which the defendant then and there had, in the presence and hearing of divers other persons, of and concerning the plaintiff, the defendant, further contriving and intending as aforesaid, in the presence and hearing of those persons falsely and maliciously spoke and published of and concerning the plaintiff these other false, scandalous, malicious and defamatory words following, that is to say, "He, etc., (*setting out the words, with proper innuendoes.*)

By means of the committing of which said several grievances by the de-

¹ *Long v. Hitchcock*, 3 Ohio 274; *Steph. N. P.* 2577; *Rathbun v. Emigh*, 6 Wend. 407; *Diogt v. Tanner*, 29 Wend. 190; *Hall v. Nees*, 27 Ill. 411; 2 Esp. 191; *Townsend on Sland. & Lib.*, Sec. 365.

² *Kersch v. Slusser*, 12 Ind. 453; *Townsend on Sland. & Lib.*, Sec. 330; *Heard on Sland. & Lib.*, Sec. 210;

Schmisser v. Kreilich, 92 Ill. 347; *Koch v. Heideman*, 16 Bradw. 478;

³ *Zenobio v. Axtell*, 6 Term 162; *Wormuth v. Cramer*, 3 Wend. 394; *Kersch v. Slusser*, 12 Ind. 453; *Kiene v. Ruff*, 1 Clarke (Iowa) 482; see remarks under form No. 356, *post*.

⁴ *Boyd v. Humphries*, 53 Ill. App. 422.

fendant, the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 353. For words charging an unmarried woman with fornication.

(Commence as in No. 335, ante.) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was, and always has been, virtuous and chaste, and was a person of good name and reputation, and deservedly enjoyed the esteem and good opinion of her neighbors and other worthy citizens of this state: Yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in her said good name and reputation, and to bring her into public scandal and disgrace, and to cause it to be suspected and believed by divers persons that she was unchaste, on, etc., in, etc., in a certain discourse which the defendant then and there had, in the presence and hearing of divers persons, of and concerning the plaintiff, falsely and maliciously, in the presence and hearing of the said persons, spoke and published of and concerning the plaintiff the false, scandalous, malicious and defamatory words following, that is to say, etc. (*here set out the words, with innuendoes, as in the next form*), meaning thereby then and there to charge that the plaintiff had been and was guilty of fornication. (*Add other counts if desired, and conclude as follows:*) By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in her said good name and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured. To the damage of the plaintiff of — dollars, and therefore she brings her suit, etc.¹

No. 354. For words charging perjury.

(Commence as in No. 335, ante.) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors, and other worthy citizens of this state; and whereas, also, before the committing of those grievances, to wit, on, etc., in the county aforesaid, a certain action was pending before E. F., one of the justices of the peace in and for the county aforesaid, wherein the People of the State of Illinois was plaintiff, and one G. H. was defendant, and on the trial of which said action then and there, before the said justice, the plaintiff was duly sworn and examined, and did give his evidence, as a witness, touching the matters in controversy therein. Yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in his said good

¹ *Elam v. Badger*, 23 Ill. 500.

name, credit and reputation, and to bring him into public scandal and disgrace with and among his neighbors and acquaintances, and to cause it to be suspected and believed by them and others that the plaintiff had been guilty of false swearing, afterwards, to wit, on, etc., in the county aforesaid, in a certain discourse which the defendant then and there had, in the presence and hearing of divers persons, of and concerning the plaintiff, and of and concerning the matters and premises aforesaid, falsely and maliciously, in the presence and hearing of the said persons, spoke and published, of and concerning the plaintiff, and of and concerning the matters and premises aforesaid, the false, scandalous, malicious and defamatory words following, that is to say: "You" (meaning the plaintiff) "have sworn to a damned lie:" "You" (meaning the plaintiff) "have sworn to a damned lie before Esquire E. F.," (meaning the said E. F., the justice of the peace aforesaid,) "and I" (meaning the defendant) "can prove it." "You" (meaning the plaintiff) "have sworn to a lie, and I" (meaning the defendant) "can prove it by your" (meaning the plaintiff's) "own daughter." "You" (meaning the plaintiff) "swore that you" (meaning the plaintiff) "never spoke to me" (meaning the defendant) "previous to that time" (meaning the time of the trial aforesaid) "in the street; and that is a damned lie, and I" (meaning the defendant) "can prove it." "You" (meaning the plaintiff) "have sworn falsely, and I" (meaning the defendant) "can prove it." "You" (meaning the plaintiff) "committed perjury. and I" (meaning the defendant) "can prove it by your" (meaning the plaintiff's) "daughter." "You" (meaning the plaintiff) "committed perjury." "You" (meaning the plaintiff) "swore falsely." "You" (meaning the plaintiff) "swore to a lie." "You" (meaning the plaintiff) "swore to a damned lie." Meaning and intending thereby to charge that the plaintiff, on the trial of the action aforesaid, had, as a witness as aforesaid, sworn falsely.

Second count.—And also for that whereas afterwards, to wit, on, etc., aforesaid, in, etc., aforesaid, in a certain other discourse which the defendant then and there had, of and concerning the plaintiff, in the presence and hearing of divers persons, the defendant falsely and maliciously, in the presence and hearing of those persons, spoke and published, of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, that is to say: "You" (meaning the plaintiff) "perjured yourself." "He" (meaning the plaintiff) "perjured himself." "He" (meaning the plaintiff) "committed perjury." "You" (meaning the plaintiff) "swore to a lie." "You" (meaning the plaintiff) "swore to a damned lie." "You" (meaning the plaintiff) "swore to a lie, and I" (meaning the defendant) "can prove it." By means of the speaking and publishing of which said several false, scandalous and malicious words by the defendant, the plaintiff has been and is greatly injured in his good name, credit and reputation, and brought into public scandal and disgrace, and has been and is otherwise injured: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.¹

¹ *Wolbrecht v. Bumgarten*, 26 Ill. 291.

No. 355. For words charging larceny.

(Commence as in No. 335, ante.) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of all his neighbors, and other worthy citizens of this state: Yet the defendant, well knowing the premises but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in, etc., in a certain discourse which the defendant then and there had, of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said persons, spoke and published, of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, that is to say: "He" (meaning the plaintiff) "stole my corn." "He" (meaning the plaintiff) "and S. H. stole my corn." "He" (meaning the plaintiff) "stole my hogs." "He" (meaning the plaintiff) "stole my eggs and apples." "He" (meaning the plaintiff) "keeps S. H. to steal my (meaning the defendant's) corn, and he" (meaning the plaintiff) "conceals it." Meaning and intending thereby to charge that the plaintiff had feloniously stolen, taken and carried away the goods and chattels of the defendant.

(A second count may be here inserted, if deemed necessary, concluding the declaration as follows:)

By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.¹

No. 356. For words spoken in a foreign language.

(Commence as in No. 335, ante.) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, was a person of good name and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors, and other worthy citizens of this state: Yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in, etc., in a certain discourse which the defendant then and there had, of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said divers persons, who then and there understood the *German* language, spoke and published, of and concerning the plaintiff, the false, scandalous, malicious and defamatory words following, in the said *German* language, that is to say, (*here set forth the words in the German language*); which said words signified and meant, in the English language, as follows, that is to say (*here set forth a*

¹ *Hall v. Nees*, 27 Ill. 411.

correct translation of the words in English, with innuendoes, as in Nos. 354 and 355, ante.)

(Here insert a second count, if deemed necessary, and conclude as follows:)

By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in his said good name and reputation and brought into public scandal and disgrace; and has been and is shunned and avoided by divers persons, and has been and is otherwise injured: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

Where the words were spoken or published in a foreign language the foreign words must be set forth,¹ together with a translation into English. To set forth the words alone, or the translation alone, would not be sufficient.² The omission to set forth a translation may be rectified by an amendment.³

On the general issue, the plaintiff must prove the correctness of the translation; but the accuracy of the translation is admitted by a demurrer.⁴

No. 357. By a tradesman, for words imputing insolvency, etc.—Alleging special damages.

(Commence as in No. 335, ante.) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, exercised and carried on, and still does exercise and carry on, the business of a *merchant*, in, etc., and has always conducted the same with punctuality in dealing, keeping his engagements and paying his debts, and was deservedly held in great credit and esteem by his neighbors, and those with whom he had dealings in his trade and business as such *merchant*, whereby he daily acquired divers gains and emoluments in his said trade and business, to the support and maintenance of himself and his family, and the great increase of his fortune. Yet the defendant, well knowing the premises, but contriving and wrongfully and maliciously intending to injure and destroy the good name, reputation and credit of the plaintiff in his said trade and business, and to cause him to be regarded as a person of no credit, worth or substance, and in insolvent circumstances, on, etc., in the county aforesaid, in a certain discourse which the defendant then and there had, of and concerning the plaintiff, and his circum-

¹ *Zenobio v. Axtell*, 6 Term 162.

³ *Zenobio v. Axtell*, 6 Term 162;

² *Wormuth v. Cramer*, 3 Wend.

Rahauser v. Barth, 3 Watts 28.

394; *Kersch v. Slusser*, 12 Ind. 453;

Hickley v. Grosjean, 6 Blackf. 351;

⁴ *Hickley v. Grosjean*, 6 Blackf.

Rahauser v. Barth, 3 Watts 28;

351; *Townshend on Slander*, and Lib.

Keenholts v. Becker, 3 Denio 346;

Heard on Lib. and Slander, Sec. 210.

stances, and his said trade and business, in the presence and hearing of divers persons, falsely and maliciously, in the presence and hearing of the said persons, spoke and published of and concerning the plaintiff, and his circumstances, and his said trade and business, the false, slanderous, malicious and defamatory words following, that is to say: "The property of B." (meaning the plaintiff) "will be in the hands of the sheriff by Saturday night" (meaning thereby that the plaintiff was in insolvent circumstances, and that his business was about to be closed by his creditors). "He," (meaning the plaintiff) "is trying to sell out his stock" (meaning the stock of goods which the plaintiff then had in his store,) "to avoid paying his" (meaning the plaintiff's) "debts." "He" (meaning the plaintiff) "is a rascal, and cheat, and not able to pay his" (meaning the plaintiff's) "debts."

By means of the committing of which said several grievances by the defendant, the plaintiff has been greatly injured in his said good name, credit, reputation, trade and business: And one G. H., then one of the creditors of the plaintiff, thereupon, by reason of the speaking and publishing of the said false, scandalous, malicious and defamatory words by the defendant as aforesaid, then and there sued out of the — court of the said county a certain writ of attachment, against the goods and chattels of the plaintiff, and caused the stock of goods and merchandise of the plaintiff to be seized, and the same then and there were seized, by virtue of the said writ, to satisfy the debt of the plaintiff to the said G. H.; and thereby the store of the plaintiff was then and there closed, and kept closed for a long space of time, to wit, — days, during all which time the plaintiff was hindered and prevented from carrying on his said trade and business; and he was thereby also compelled to and did then and there pay out divers sums of money, amounting to — dollars, in and about the said attachment suit, and for costs in that behalf, and in obtaining the release of his said goods and merchandise from the attachment aforesaid; and divers persons who had, before the speaking of the said false, scandalous, malicious and defamatory words by the defendant as aforesaid, been accustomed to deal, and divers other persons who would otherwise have dealt, with the plaintiff in his said trade and business, have since that time, and wholly on that account, respectively refused to do so; and particularly one E. F., by reason of the speaking and publishing of the said false, scandalous, malicious and defamatory words by the defendant as aforesaid, then refused, and thence hitherto has refused to have any dealings or transactions with the plaintiff in his said trade and business, as he, the said E. F., otherwise might and would have had; and by means of the several premises the plaintiff has there lost and been deprived of divers great gains and profits which otherwise would have accrued to him in his said trade and business, and has been and is otherwise injured: (*here add any other cause of special damage that may accord with the facts*): To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 358. For libel in a newspaper.

(*Commence as in No. 335, ante.*) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several griev-

ances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of this state: Yet the defendant, well knowing the premises, but wickedly and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, etc., in, etc., wickedly and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff, in a certain newspaper called the —, whereof the defendant was then and there the editor and proprietor, a certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious, defamatory and libelous matters following, of and concerning the plaintiff, that is to say: “He, (meaning the plaintiff) etc. (*setting out the libelous matter in hæc verba, with proper innuendoes, as in the next form.*)

Second count.—And the defendant, further contriving and intending as aforesaid, afterwards, to wit, on, etc., aforesaid, in, etc., aforesaid, falsely, wickedly and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff, in the said newspaper called the —, whereof the defendant was then and there the editor and proprietor, a certain other false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, malicious, defamatory and libelous matters following, of and concerning the plaintiff, that is to say, etc. (*Here set out the libelous matter, with proper innuendoes, as in next form.*

By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in his said good name, credit and reputation, and brought into public scandal and disgrace, and has been and is shunned and avoided by divers persons, and has been and is otherwise injured. To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

No. 359. For libel by letter, imputing insolvency; claiming special damages, etc.

(*Commence as in No. 335, ante.*) For that whereas the plaintiff, before and at the time of the committing by the defendant of the several grievances hereinafter mentioned, exercised and carried on, and still does exercise and carry on, the business of a *merchant*, in, etc., and has always conducted the same with punctuality in dealing, keeping his engagements, and paying his debts, and was deservedly held in great credit and esteem by his neighbors and those with whom he had dealings in his trade and business as such merchant, whereby he daily acquired divers gains and emoluments in his said trade and business, to the support and maintenance of himself and his family, and the great increase of his fortune: Yet the defendant, well knowing the premises, but wickedly and maliciously intending to injure and destroy the good name, reputation and credit of the plaintiff in his said trade and business, and to cause him to be regarded as a person of no credit, worth, or substance, and in insolvent circumstances, and to prejudice and injure the plaintiff with one E. F., a trader and merchant doing business at —, who for a long time before

then had dealt, and was then dealing, with the plaintiff in the way of his said trade and business, and to induce the said E. F. to leave off dealing with the plaintiff, on, etc., in, etc., did wrongfully, falsely and maliciously write and publish a certain false, scandalous, malicious and defamatory libel, of and concerning the plaintiff, and of and concerning his said trade and business, circumstances and credit, in the form of a letter addressed to the said E. F., containing the false, scandalous, malicious, defamatory and libelous matters following, that is to say: "Sir, you (meaning the said E. F.) but as I (meaning the defendant) have no other view but doing as I (meaning the defendant) would be done by, therefore as I (meaning the defendant) believe you (meaning the said E. F.) are a fair trader, therefore can not see you (meaning the said E. F.) wronged without letting you (meaning the said E. F.) know it, for I (meaning the defendant) am told you (meaning the said E. F.) have large dealings with one A. B., (meaning the plaintiff,) and he (meaning the plaintiff) was a bankrupt some years before, (meaning before the writing and publishing of the said libel,) and never could get his (meaning the plaintiff's) certificate; so all that he (meaning the plaintiff) has or deals for is his (meaning the plaintiff's) former creditors' rights, and he (meaning the plaintiff) has not been in business above three quarters of a year, and now is joined with his (meaning the plaintiff's) brother, (meaning one O. D.,) and they (meaning the plaintiff and the said O. D.) get all the credit they (meaning the plaintiff and O. D.) can by one (meaning one of the two last-mentioned persons) recommending another, (meaning one of the two last-mentioned persons,) and they (meaning the plaintiff and the said O. D.) are arrested every day, etc., to bail one another and pay nobody, so now I (meaning the defendant) have done my (meaning his, the defendant's) part, and if you (meaning the said E. F.) are not the man it (meaning the said letter or libel) was designed for, pray burn it (meaning the said letter or libel); and if you (meaning the said E. F.) take hint, burn it, (meaning the said letter or libel,) for the writer (meaning the defendant) is neither to get nor lose by it, so farewell." And the defendant then and there falsely and maliciously sent the said letter, containing the false, scandalous, malicious, defamatory and libelous matters aforesaid, by mail to the said E. F., and the same was then received and read by the said E. F., as thereby published by the defendant to the said E. F. By means of the committing of which said several grievances by the defendant, the plaintiff has been and is greatly injured in his said good name, reputation, credit, trade and business, and has fallen into great discredit among his creditors, and other worthy persons with whom he had dealt and traded in his said trade and business, and of whom he was accustomed to buy goods and merchandise on credit, and especially the said E. F.; inasmuch that those creditors, and other persons, and especially the said E. F., wholly on account of the writing and publishing of the said false, scandalous, malicious and defamatory libel by the defendant as aforesaid, have altogether refused, and still refuse, to buy of, or sell to, or have anything to do with, the plaintiff in his trade and business aforesaid; (*here may be added any other causes of special damage that the facts may justify;*) and also by

means of the premises the plaintiff has been and is otherwise injured: To the damage of the plaintiff of — dollars, and therefore he brings his suit, etc.

A publication, to be a libel, must tend to injure the plaintiff's reputation, or expose him to public hatred, contempt or ridicule,¹ but it need not charge a crime.² It is defined by the statute of Illinois to be a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects, of one who is alive, and thereby to expose him or her to public hatred, contempt or ridicule.³

An action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt or ridicule, even though the same words spoken would not have been actionable.⁴

Where a member of a school district wrote a letter to a school committee, accusing a teacher of a want of chastity, and remonstrating against her appointment, it was held that the communication was libelous, if shown to have been made with malice, or without probable cause.⁵

The better and prevailing opinion is that no action for libel can be maintained for defamatory matter contained in a pleading in a court of civil jurisdiction.⁶

A corporation is not liable for a libel written by an agent without its express authority, although such libelous writing relates to the business of the company.⁷

DEFENSES TO THE ACTION.

For pleas in abatement, and observations on the principles governing the same, see Defenses to an Action, *ante*, page 32.

¹ *Armen v. Moranda*, 8 Blackf. 426; *seq.*; *Cervený v. Daily News*, 139 Ill. 345.
Gosling v. Morgan, 32 Penn. St. 273.

² *Johnson v. Stebbins*, 5 Ind. 364.

³ *Starr & Curtis' Stat.* 804; *Rev. Stat.* (1893), 500; *Rev. Stat.* (1895), 543; see *Clay v. People*, 86 Ill. 147.

⁴ *Newell on Def. and Sland.* 78 *et*

⁵ *Bodwell v. Osgood*, 3 Pick. 379.

⁶ *Townshend Sland. and Lib.* 381; *McLaughlin v. Cowley*, 127 Mass. 316; *Ash v. Zweisusch*, 57 Ill. App. 157.

⁷ *Ex. Co. v. Fitzner*, 59 Miss. 581;

Pleas in bar.—In an action on the case, the plea of not guilty is the general issue.

No. 360. Plea of not guilty.

In the ——— Court.

—— Term, 18—.

C. D.)
ats. } *Case.*

A. B.) And the defendant, by E. F., his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against him: And of this the defendant puts himself upon the country, etc.

The plea of *not guilty*, in an action on the case, puts in issue the wrongful act, and it is very seldom necessary to plead any other plea. The gist of the action is the *tort*, and this is put in issue by this plea. It compels the plaintiff to prove every essential allegation in his declaration that goes to make up the liability of the defendant. The facts stated in the inducement, however, are not put in issue by it.¹ Thus where the action is for negligent driving, and the defendant's possession of the carriage alleged to have been negligently driven is stated in the declaration by way of inducement, such possession is admitted by the plea.²

In an action under the statute of Illinois, for causing the death of a person by negligence, the plea of not guilty puts in issue the allegation of there being a widow or next of kin surviving, as well as the commission of the act complained of.³

Special pleas generally.—As an action on the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and is in effect so, the defendant may, under the general issue, introduce in evidence any matters which show that the cause of action has been discharged, or that in equity and good conscience the

Woodling v. Knickerbocker, 31 Minn. 268; *Harding v. Greening*, 8 Taunt. 42; *Ins. Co. v. Paul*, 37 Ill. App. 439.

¹ *Allen v. Michel*, 38 Ill. App. 318;

² *Greenl. Ev.*, Sec. 231.

² *2 Steph. N. P.* 1025.

³ *Conant v. Griffin*, 48 Ill. 410.

plaintiff ought not to recover.¹ Thus a release, former recovery, or satisfaction need not be pleaded.²

But to this general rule there are some exceptions, such as the statute of limitations, and justification in an action for slander, alleging the truth of the words, which must be specially pleaded.³

The defendant may, however, plead specially anything which, admitting that the plaintiff once had a cause of action, goes to discharge it; such as a release, accord and satisfaction, discharge in bankruptcy, former recovery, etc.⁴

General issue in actions for slander.—In an action for oral or written slander, the plea of *not guilty* operates as a denial of the extrinsic facts stated in the inducement; the speaking of the words, or publication of the libel; the truth of the *colloquium*, or the application of the words to the plaintiff, and to the extrinsic facts stated in the declaration; and the damage, when special damage is necessary to maintain the action. And when the defense is, that the libel or words were published or spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon a justifiable occasion, this matter may be given in evidence under the general issue.⁵ The defendant can not prove under the general issue the truth of the words, either in bar of the action, or in mitigation of damages.⁶

¹ 1 Chit. Pl. 432; Greenl. on Ev., Sec. 231; *Kennedy v. Strong*, 10 Johns. 291; see *Miller v. Manice*, 6 Hill 114.

² And. Steph. Pl. 238-239; 2 Bing. 377; 2 Greenl. on Ev., Sec. 231.

³ 1 Chit. Pl. 434, 436; 2 Greenl. on Ev., 232.

⁴ *Hurst v. Cook*, 19 Wend. 463; *Miller v. Manice*, 6 Hill 114; see 1 Chit. Pl. 432-435.

⁵ *Frank v. Kaminsky*, 109 Ill. 26; *Koch v. Heideman*, 16 Bradw. 478; *Welker v. Butler*, 15 Bradw. 209; *Tunnell v. Ferguson*, 17 Bradw. 76;

Scott v. Fleming, 17 Bradw. 561; *Lafallette v. McCarthy*, 18 Bradw. 87; And. Steph. Pl. 125 n.; Townshend on Slan. & Lib., Sec. 350; 2 Greenl. Ev., Sec. 421; *Darling v. Banks*, 14 Ill. 46; *Tottleben v. Blankenship*, 58 Ill. App. 47.

⁶ 2 Greenl. Ev., Sec. 424; Heard on Slan. & Lib., Sec. 239; Townshend on Slan. & Lib., Sec. 211, and cases there cited; *Sheahan v. Collins*, 20 Ill. 325; *Taylor v. Robinson*, 29 Me. 323; *Haws v. Stanford*, 4 Sneed (Tenn.) 520; *Sidgreaves v. Myatt*, 22 Ala. 617.

Proof of the general bad character of the plaintiff is admissible in order to reduce the damages;¹ but witnesses should not be allowed to give in detail all the reports in circulation derogatory to the plaintiff's character, as it would lead to endless investigation, and burden the case with immaterial circumstances, without any beneficial results.²

It may also be shown, in mitigation of damages, that the words were spoken in the heat of passion;³ but anger is not a justification of the use of slanderous words, or even a mitigation of the offense, unless provoked by the person against whom such words are used.⁴ And it may be proved that the defendant was insane at the time he spoke the words.⁵

The defendant is allowed to prove that at the time and place of uttering the words he offered an explanation of them.⁶

It is not admissible, under the general issue, to prove in mitigation of damages that there were rumors in the plaintiff's neighborhood that he had been guilty of the offense charged.⁷

In short, the defendant, where he does not justify, can mitigate damages in two ways only: first, by showing the general

¹ *Young v. Bennett*, 4 Scam. 43; *Adams v. Smith*, 58 Ill. 417; 2 Greenl. Ev., Sec. 424; *Paddock v. Salisbury*, 2 Cow. 811; *Ross v. Lapham*, 14 Mass. 275; 2 Stark. Ev. 216, 470; *Regnier v. Cabot*, 2 Gilm. 34; *Sheahan v. Collins*, 20 Ill. 325; *Burke v. Miller*, 6 Blackf. 155; *Moyer v. Pine*, 4 Mich. 409; *Fletcher v. Burrows*, 10 Iowa 557; *Mahoney v. Belford*, 132 Mass. 393. But see 1 Chit. Pl. 493; 11 Price, 235.

² *Sheahan v. Collins*, 20 Ill. 325; *Steinman v. McWilliams*, 6 Burr. 170; *Parkhurst v. Ketchum*, 6 Allen (Mass.) 406; Townshend on Slan. and Lib., Sec. 407.

³ *Brown v. Brooks*, 3 Ind. 518; *Iseley v. Lovejoy*, 8 Blackf. 462; *Gates v. Meredith*, 7 Ind. 440; *Dailey v. Reynolds*, 4 Iowa 354; *Larned v. Buffinton*, 3 Mass. 546; *Thomas v. Fisher*, 71 Ill. 576; *Miller v. Johnson*,

79 Ill. 58; see *Sheffill v. Van Deusen*, 15 Gray, 485.

⁴ *Freeman v. Tinsley*, 50 Ill. 497; see *Hosley v. Brooks*, 20 Ill. 115; *Brown v. Burnett*, 10 Bradw. 279; *Storey v. Early*, 86 Ill. 461.

⁵ *Yeates v. Reed*, 4 Blackf. 463; see *Young v. Richardson*, 4 Bradw. 364; *Gault v. Babbitt*, 1 Bradw. 130; *Hay v. Mather*, 15 Bradw. 30.

⁶ *Winchell v. Strong*, 17 Ill. 597; *Hagan v. Hendry*, 18 Md. 177; see *Hatch v. Potter*, 2 Gilm. 725; *Owen v. McKean*, 14 Ill. 459.

⁷ *Young v. Bennett*, 4 Scam. 43; *Owen v. McKean*, 14 Ill. 459; *Lehning v. Hewett*, 45 Ill. 23; *Bodwell v. Swan*, 3 Pick. 376; *Larned v. Buffinton*, 3 Mass. 546; *Walcott v. Hall*, 6 Mass. 514; *Treat v. Browning*, 4 Conn. 408; *Weed v. Bibbins*, 32 Barb. (N. Y.) 315,

bad character of the plaintiff; second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge.¹

Special pleas in actions for slander.—As we have just seen, a defendant can not, under the general issue, in an action for libel or slander, give in evidence the truth of the matter or any part of it, even in mitigation of damages, but he must justify specially,² or give notice of matter in justification with the general issue.³

In framing a plea of justification, care must be taken to observe the following rules: first, it is necessary, although the libel contains a *general* imputation upon the plaintiff's character, that the plea should state *specific facts*, showing in what particular instances and in what manner, he has misconducted himself; second, the matter set up by way of justification should be strictly conformable with the slander laid in the declaration, and must be proved as laid, at least in substance; and third, if the matter of justification can be extended to the whole of the libel or slander, the plea should not be confined to part only, leaving the rest unjustified.⁴

It is no objection to a plea, however, that it does not justify the speaking of all the words; if the charge is divisible, a justification of part will be good *pro tanto*.⁵ But in such case the plea, in the introductory part, must not profess to answer the

¹ *Regnier v. Cabot*, 2 Gilm. 34; *Young v. Bennett*, 4 Scam. 43; *Wetherbee v. Marsh*, 20 N. H. 561; *Fuller v. Dean*, 31 Ala. 654; see 1 Chit. Pl. 433, 434.

² 1 Chit. Pl. 494; *Shepard v. Merrill*, 13 Johns. 475; *Henson v. Veatch*, 1 Blackf. 369; *Haws v. Stanford*, 4 Sneed 520; *Hagan v. Hendry*, 18 Md. 177; *Cracraft v. Cochran*, 17 Iowa 301; *Townshend on Slan. and Libel*, Sec. 409; *Scott v. McKinnish*, 15 Ala. 662; *Teagle v. Deboy*, 8 Blackf. 134; *Heard on Lib. and Slan.*, Sec. 239.

³ *Darling v. Banks*, 14 Ill. 46; *Townshend on Slan. and Lib.*, Sec.

251; *Brickett v. Davis*, 21 Pick. 404; *Mitchell v. Borden*, 8 Wend. 570; *Bissell v. Cornell*, 24 Wend. 354;

⁴ 1 Chit. Pl. (11 Am. Ed.) 494; *Cro. Jac.* 676, 578; *Cro. Eliz.* 623; *Bell v. Byrne*, 13 East 544; *Weaver v. Lloyd*, 2 B. & C. 678; 4 D. & R. 230; S. C., 1 Starkie on Slander, (2 Ed.) 480; *Kent v. David*, 3 Blackf. 298; *Heard on Lib. & Slan.*, Sec. 240; *Sharpe v. Stephenson*, 12 Ired. 348; *Sterling v. Sherwood*, 20 Johns. 204; *Gault v. Babbitt*, 1 Brad. (Ill.) 130.

⁵ 6 Bing. 587; see 1 Stark. Slan. (2 Ed.) 484.

whole of the declaration or count, but only such part or parts as it really does answer.¹

To support a special plea in justification, where crime is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime charged;² and it is conceived that he would be entitled to the benefit of any reasonable doubt of his guilt in the minds of the jury, in the same manner as in a criminal trial. If the evidence falls short of proving the commission of the crime, the jury may still consider the circumstances, as tending to show that the defendant had probable cause to believe the charge to be true, and to lessen the character of the plaintiff, and therefore to reduce the amount of the damages.³

The statute provides that "it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of the testimony."⁴

No. 361. Plea justifying words imputing perjury.

(*First plea not guilty*—No. 360, ante.) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, that before the committing of the said supposed grievances in the said declaration mentioned, to wit, on, etc., in, etc., at a term of the — court, of the said county, begun and held at —, within and for the said county, on, etc., before the Honorable E. F., then being judge of the same court, a certain issue duly joined in the said court, between one G. H. and one L. M., in a certain plea of *trespass*, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, duly summoned, impaneled and sworn between the parties aforesaid; and that upon the said trial the plaintiff appeared as a witness on the part of the said L. M., and was duly

¹ 1 Chit. Pl. (11 Am. Ed.) 497.

² *Hicks v. Rising*, 24 Ill. 566; *Bu-ford v. Wible*, 32 Penn. 95; *Harbi-son v. Shook*, 41 Ill. 141; *Darling v. Banks*, 14 Ill. 46; *Crandall v. Daw-son*, 1 Gilm. 556; *Crotty v. Morris-sey*, 40 Ill. 477; *Landis v. Shanklin*, 1 Carter (Ind.) 92; *Gants v. Vinard*, 1 Carter (Ind.) 476; *Shoulty v. Miller*, 1 Carter (Ind.) 544; *Stein v. Mc-Williams*, 6 Barr. 170; *Woodbeck v. Keller*, 6 Cow. 118; *Newell on Def. and Slan*, 651.

³ 2 Greenl. Ev., Sec. 426; 2 Stark. on Slan. 83-94, and notes by Wendell; see also 7 Law Reporter 533; 4 Esp. 248; 2 C. & P. 570; 1 M. & M. 46; *Crandall v. Dawson*, 1 Gilm. 556; *Corbley v. Wilson*, 71 Ill. 209.

⁴ 2 Starr & Curtis' An. Stat. 2286; Rev. Stat. (1895) 1450; Rev. Stat. (1893) 1353; *Hawver v. Hawver*, 78 Ill. 412; *Tunnell v. Ferguson*, 17 Bradw. 76; *Scott v. Fleming*, 17 Bradw. 561.

sworn, and took his oath before the said court, to speak the truth, the whole truth, and nothing but the truth, touching the matters in issue on the said trial; and that at and upon the said trial, certain questions became and were material, in substance as follows, that is to say (*here state the material questions*); and that the plaintiff, being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a court of justice, at and upon the said trial, in the court aforesaid, then and there falsely, willfully, voluntarily and corruptly did say, depose and swear, among other things, in substance and to the effect following, that is to say, (*here state the evidence, as fully as the words in the declaration*); whereas, in truth and in fact (*here negative the plaintiff's evidence, as in an indictment for perjury*): And the plaintiff did thereby in the said court, so held as aforesaid, upon his said oath upon the trial as aforesaid, in matter and form as aforesaid, commit willful and corrupt perjury; wherefore the defendant, at the time mentioned in the said declaration, in, etc., spoke and published of and concerning the plaintiff the said several words in the said declaration mentioned, as it was lawful for him to do for the cause aforesaid. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.¹

It is said that the plea of justification must be direct and explicit. It must in every respect correspond with, and be as extensive as, the charge in the declaration. "It must be as broad as that charge is; if it go beside it, or fall short of it, it is naught; it must be, in point of law, identical with it."²

No. 362. General replication, *de injuria*.

In the ——— Court.

— Term, 18—.

A. B. }
vs. } Case.

C. D. } And the plaintiff, as to the plea of the defendant by him *secondly* above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says, that the defendant, at the said time when, etc., in the said declaration mentioned, of his own wrong, and without the cause by him in that plea mentioned, did commit the said several grievances in the said plea mentioned, in manner and form as the plaintiff has in his said declaration above thereof complained against him, the defendant: And this the plaintiff prays may be inquired of by the country, etc.

The general replication, *de injuria*, is the proper replication to a plea of justification, in actions for oral and written slander.³

¹ Wharton's Prec. of Indict. and 10 B. & C. 263; 10 Bing. 519; Heard Pleas, 294; 3 Chit. Pl. 1033. on Lib. and Slander, Sec. 242.

² *Jenkins v. Cocker*, 1 Ired. 309; ³ 1 Chit. Pl. 590; *Allen v. Crofoot*,

No. 363. *Plea justifying words imputing larceny.*

(*First plea not guilty*—No. 360, ante.) And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says, that the plaintiff, before the committing of the said supposed grievances in the said declaration mentioned, to wit, on, etc., in, etc., *one horse*, of the value of — dollars, of the goods and chattels of one E. F., then and there being found, feloniously did steal, take, lead and drive away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the said State of Illinois: Wherefore the defendant, at the time mentioned in the said declaration, there spoke and published, of and concerning the plaintiff, the said several words in the said declaration mentioned, as it was lawful for him to do, for the cause aforesaid. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.¹

Reply *de injuria*, as in No. 362, ante.

Other forms of pleas of justification can readily be framed from the above precedent, by setting out the matter of the plea as in an indictment for the offense charged.

For demurrers, see “Defenses to an Action” and for pleas of statute of limitations, release, former recovery, accord and satisfaction, etc., see titles of those pleas in Assumpsit.

7 Cow. 45; *Craft v. Boite*, 1 Saund. 244 c; Heard on Lib. and Sland., Sec. 252; Newell on Def., S. & L. 665;

see 7 Price, 670; *Allen v. Scott*, 13 Ill. 80.

¹ Whart. Prec. of Indict. & Pleas, 190; *Craft v. Boite*, 1 Saund. 244 c.

CHAPTER XXIII.

AMENDMENTS.

It has been remarked that the history of the English law in regard to amendments would illustrate the common and natural tendency of all men, at all times, where an abuse exists in government, morals, or conduct, to correct the abuse a little too thoroughly.¹ In early times the English courts permitted parties to amend their pleadings as well after as before judgment was pronounced, and even after the judgment was entered. If any mis-entry had been made, it was corrected by the minutes, or by the recollection of the judges. But under this practice of amending records, the judges altered and falsified their own records for sinister purposes, by making erasures and amendments privately; and this abuse became so great that in the reign of Edward I. very heavy punishments were inflicted upon almost all the king's justices. The succeeding judges, bent on a thorough and radical reform of this great abuse, resolved that a record should be held sacred, and should not be amended at all, when enrolled, and the term was at an end. The rule having been thus established, their successors found themselves tied down to a reform by which manifest errors, slips of the pen and mis-spellings occasioned the reversal of meritorious judgments, and such palpable injustice was thereby occasioned that the British Parliament has, from time to time ever since, been endeavoring to reform the reform, and has passed a great many statutes for that purpose.²

Amendments generally.—Amendments at common law, independently of any statutory provision on the subject, are in all cases in the discretion of the court, for the furtherance

¹ 2 Swan's Pr. 843.

² 3 Bla. Com. 407, 411; 2 Swan's Pl. 843.

of justice.¹ They may be made while the proceedings are in paper, that is, until judgment is signed, and during the term in which it is signed; for until the end of the term the proceedings are considered only *in fieri*, and consequently subject to the control of the court;² and even after judgment is signed, and up to the latest period of the action, amendment is in most cases allowable, in the discretion of the court, under statutes for allowing amendments of the record; and in later times the judges have been much more liberal than formerly, in the exercise of this discretion.³ Amendments may be made after the term,⁴ although formerly the rule was otherwise;⁵ and even after error brought, where there has been a verdict in the cause.⁶ A *remittitur damna* may be allowed after error;⁷ and this although error has been brought on the ground of the excess of damages remitted;⁸ but the application for the *remittitur* must be made in the court below. So by agreement of attorneys, the record may be amended after error.⁹ Amendments are, however, always limited by due consideration of the rights of the opposite party; and when by the amendment he would be prejudiced, or exposed to unreasonable delay, it is not allowed.¹⁰

¹ 1 Bouv. L. D. 98; see *Martin v. Russell*, 3 Scam. 342; *McBain v. Enloe*, 13 Ill. 76; *Campbell v. Head*, 13 Ill. 122; *Stephens v. People*, 13 Ill. 131; *Crain v. Bailey*, 1 Scam. 321; *Harlan v. Scott*, 2 Scam. 65; *Jackson v. Warren*, 32 Ill. 331; *Griffin v. City*, 50 Ill. 422; *Bemis v. Homer*, 145 Ill. 567; *R. R. Co. v. Logue*, 158 Ill. 621; but see also Sec. 61, Practice Act.

² 3 Black's Com. 407; *Stall v. Webster*, 11 Ill. 511; *Coughran v. Gutchens*, 18 Ill. 390; *Dunham v. Chicago*, 55 Ill. 358.

³ *Nelson v. Barker*, 3 McLean 379; *Stewart v. Bennett*, 1 Branch (Fla.) 437; *Pinkston v. Taliaferro*, 9 Ala. 547; *Smith v. Vanderberg*, 46 Ill. 34.

⁴ *O'Conner v. Mullen*, 11 Ill. 57; *Stall v. Webster*, 11 Ill. 511; *Hunter*

v. Sherman, 2 Scam. 539; *Michael-tree v. Sparks*, 1 Scam. 122; *Duncan v. McAfee*, 3 Scam. 93; see *Campbell v. Head*, 13 Ill. 122; *McCormick v. Wheeler*, 36 Ill. 114; *Wallahan v. People*, 40 Ill. 102; *Ass'n v. Rivardan*, 61 Ill. App. 457.

⁵ Co. Lit. 260, a.; 3 Blac. Com. 407.

⁶ *Bailey v. Musgrave*, 2 S. & R. 219; *Hawes v. Hawes*, 33 Ill. 287; *R. Co. v. Butler*, 53 Ill. 323.

⁷ *Furry v. Stone*, 2 Dall. 184; *Furry v. Stone*, 1 Yeates 186; *Stone v. Furry*, Addis. 115.

⁸ *Bailey v. Musgrave*, 2 S. & R. 219; *Hunter v. Sherman*, 2 Scam. 539.

⁹ *Johnson v. Chaffant*, 1 Binn. 75; *Baring v. Shippen*, 2 Binn. 169; *Hawes v. People*, 129 Ill. 123.

¹⁰ See Bac. Abr., Amend., 2 Arch.

It is the duty of courts to reasonably exercise their power to allow amendments of the pleadings. It is the policy of our statute relating to amendments, that parties shall not be deprived of any substantial rights through defects or omissions in pleadings, if they will use reasonable diligence to avoid the result by applying to the court for leave to amend, or supply the omission.¹

Amendments before judgment.—The provisions of section 23 of the Practice Act in this regard, are as follows:

“At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense.² The adjudication of the court, allowing an amendment, shall be conclusive evidence of the identity of the action.”³

“In case another defendant is added, summons may issue against such defendant, returnable to the next term of the court, and he may be proceeded against in the same manner as if he had been made a defendant at the commencement of the suit.”

Prac. 230; And. Steph. Pl. 168; *Coughran v. Gutchen*, 18 Ill. 390; *McCormick v. Wheeler*, 36 Ill. 114; *Koch v. Roth*, 150 Ill. 212.

¹ *Bemis v. Homer*, 145 Ill. 567.

² Rev. Stat. (1893) 1074; Rev. Stat. (1895) 1158; 2 Starr & Curtis 1787; see *R. R. Co. v. Lickiss*, 72 Ill. 521; *Cogshall v. Beesley*, 76 Ill. 445; *Ins. Co. v. Mueller*, 77 Ill. 22; *Schell v. Eidman*, 77 Ill. 301; *Thompson v. Sornerberger*, 78 Ill. 353; *Ins. Co. v. Foote*, 79 Ill. 361; *Griswold v. Shaw*, 79 Ill. 449; *Cox v. Jordon*, 86 Ill. 560; *Kipp v. Bell*, 86 Ill. 577; *McDowell v. Town*, 90 Ill. 359; *Thomas v. Ins. Co.*, 108 Ill. 91; *Ins. Co. v. Ludwig*,

108 Ill. 514; *Lockwood v. Doane*, 107 Ill. 235; *N. B. Ass'n v. Jackson*, 114 Ill. 533; *Sullman v. Barrett*, 18 Bradw. 573; *Tomlinson v. Earnshaw*, 112 Ill. 311; *Carpenter v. Bank*, 119 Ill. 352; *Schirmer v. Baecker*, 20 Bradw. 373; *R. R. Co. v. Gates*, 120 Ill. 86; *Acc. Ass'n v. Tuggles*, 138 Ill. 428; *R. R. Co. v. Surwald*, 147 Ill. 194; *Strean v. Lloyd*, 128 Ill. 493; *Flower v. Brumbach*, 131 Ill. 646; *Pardridge v. Ryan*, 134 Ill. 247; *Brown v. Tuttle*, 27 Ill. App. 389; *Madderon v. Mfg. Co.*, 35 Ill. App. 588.

³ *Fish v. Farwell*, 160 Ill. 236.

"No amendment shall be cause for a continuance unless the party affected thereby, or his agent or attorney, shall make affidavit that in consequence thereof he is unprepared to proceed to or with the trial of the cause at that term, stating in such affidavit what particular fact or facts the party expects to prove by such evidence, and that he verily believes that if the cause is continued he will be able to procure the same by the next term of the court; *provided*, that if the court is satisfied that such evidence would not be material on the trial of the cause, or if the other party will admit the affidavit in evidence, subject to the effect given to affidavits for a continuance * * * the cause shall not be continued."¹

Under our statute, the court may allow an amendment of the declaration to avoid a variance, upon such terms as it may see fit to impose, after which the cause may proceed as though no variance had ever existed.²

In proper cases the court may allow amendments and proceedings in a cause to be filed *nunc pro tunc*. But this should never be allowed when it would work injustice.³

Terms.—When an amendment is allowed, the court usually imposes terms upon the party at whose instance the amendment is made, as the payment of costs. This, however, is in the discretion of the court.⁴

Amendment of executions.—An execution may be amended by the judgment as well after as before a sale under it.⁵ But it will not be permitted to amend an execution by striking out the name of the county to which it is directed, and inserting another, after a sale under such writ.⁶

Amendment of returns.—By the fourth section of the stat-

¹ Rev. Stat. (1893) 1074; Rev. Stat. (1895) 1158; 2 Starr & Curtis 1788; *Dobbins v. Higgins*, 78 Ill. 440; *Crist v. Wray*, 76 Ill. 204; *Mills v. Executors*, 76 Ill. 381; *R. R. Co. v. Stein*, 75 Ill. 41.

² *Ry. Co. v. Ward*, 135 Ill. 511; *Society v. Fietsam*, 97 Ill. 474.

³ *Littlefield v. Schmoldt*, 24 Ill. App. 624.

⁴ 1 Starr & Curtis 265; Rev. Stat.

(1893), 142; Rev. Stat. (1895), 144; *Heslep v. Peters*, 3 Scam. 45; *Jackson v. Warren*, 32 Ill. 331; *Misch v. McAlpin*, 78 Ill. 507; *R. R. Co. v. Logue*, 58 Ill. App. 142; *Jenks v. Vandolah*, 29 Ill. App. 163.

⁵ *Lewis v. Lindley*, 28 Ill. 147; *Durham v. Heaton*, 28 Ill. 264; *McCormick v. Wheeler*, 36 Ill. 114.

⁶ *Bybee v. Ashby*, 2 Gilm. 151; *McCormick v. Wheeler*, 36 Ill. 114.

ute of amendments "the returns of the sheriffs or other officers may be amended" according to the truth of the matter, by the court to which the return shall be made, in its discretion, as well before as after judgment.¹ Such amendment may be made after a cause has been appealed.² At the term to which the process is returnable the leave may be allowed without notice to the party affected, and as a matter of course.³ But after a writ has been actually returned to, and placed in, the clerk's office, the return can only be amended by leave of the court, which leave is, however, rarely refused.⁴ And after the term, and after the term of the office of the officer making the return, it may be amended within any reasonable time, upon proper notice to parties to be adversely affected.⁵ But the amendment can only be made by the officer who made the return and upon proper notice.⁶

Amendment of record.—Courts have authority to allow amendments of their records, during the term in which they are entered.⁷

It is a well settled rule that after a term has expired a

¹ Rev. Stat. (1893), 143; Rev. Stat. (1895), 145; 1 Starr & Curtis 272; *County v. Milligan*, 143 Ill. 321; *Moore v. Purple*, 3 Gilm. 149; *Montgomery v. Brown*, 2 Gilm. 581; *Morris v. Trustees*, 15 Ill. 266; *Turney v. Organ*, 16 Ill. 43; *Hawes v. Hawes*, 33 Ill. 287; *Dunn v. Rogers*, 43 Ill. 260; *Johnson v. Adelman*, 35 Ill. 265; *Kinney v. Knoebel*, 47 Ill. 417; *R. R. Co. v. Butler*, 53 Ill. 323; *Ins. Co. v. Chamber of Com.*, 69 Ill. 22; *Smith v. Bridge Co.*, 13 Bradw. 572; *Tucker v. Hamilton*, 108 Ill. 464; *Noyes v. Kingman*, 40 Ill. App. 187.

² *Ellis v. Eubanks*, 3 Scam. 584; *Hawes v. Hawes*, 33 Ill. 286; *Toledo v. Butler*, 53 Ill. 323; *Tennant v. Hargardine*, 58 Ill. App. 368.

³ *O'Conner v. Wilson*, 57 Ill. 226; *Ins. Co. v. Kellogg*, 82 Ill. 614; *Windett v. Hamilton*, 52 Ill. 180.

⁴ *Nelson v. Cook*, 19 Ill. 440; *Terry*

v. College, 70 Ill. 236; see *Howell v. Ins. Co.*, 62 Ill. 50; *O'Conner v. Wilson*, 57 Ill. 226.

⁵ *Mill Co. v. Bank*, 97 Ill. 294; *Thriffs v. Fritz*, 101 Ill. 457; *Howell v. Ins. Co.*, 62 Ill. 50; *Terry v. College*, 70 Ill. 236; *Thatcher v. Miller*, 13 Mass. 271; *Johnson v. Donnell*, 15 Ill. 97; *Morris v. Trustees*, 15 Ill. 266; see *Frazier v. Laughlin*, 1 Gilm. 185; *Spellmeyer v. Gaff*, 112 Ill. 29; *Gaff v. Spellmeyer*, 13 Bradw. 294; *County v. Milligan*, 143 Ill. 321.

⁶ *Wilson v. Greathouse*, 1 Scam. 174; *O'Conner v. Wilson*, 57 Ill. 226.

⁷ *Stahl v. Webster*, 11 Ill. 511; *Coughran v. Gutchens*, 18 Ill. 390; see *Smith v. Vanderberg*, 46 Ill. 34; *Leslie v. Fisher*, 62 Ill. 118; *Seeley v. Pelton*, 63 Ill. 101; *Tob. Co. v. Randall*, 114 Ill. 425; *Hansen v. Schlesinger*, 125 Ill. 234.

court has no authority to set aside a judgment, or to amend it except in matters of form and for the purpose of correcting clerical errors,¹ but it may be opened or set aside by consent of the parties.²

It is also a general rule that amendments of the record will not be allowed after the close of the term at which the record was made, unless there are some memoranda, minutes or notes of the judge, or something appearing on the records or files to amend by, and notice should be given of an amendment in a matter of form.³

Where an order allowing a material amendment in the record is entered at a subsequent term without notice to the adverse party, the court entering such order is without jurisdiction, and such order can be assailed in a collateral as well as in a direct proceeding.⁴

It is not admissible to affect rights already vested, by an amendment of a record subsequent to the time of their being vested, nor to affect one not a party in the proceeding in which the amendment is allowed.⁵

Under our practice, amendments of the record in affirmance of the judgment, when there is anything to amend by, may, upon notice, be made at a term subsequent to that at which final judgment is rendered; but amendments not in affirmance, but in derogation, of the judgment, are not allowed at a term subsequent to that at which final judgment is rendered.⁶

¹ *Ayer v. Chicago*, 149 Ill. 262; *O'Connor v. Mullen*, 11 Ill. 57; *Hunter v. Sherman*, 2 Scam. 539; see *Campbell v. Head*, 13 Ill. 122; *Michaeltree v. Sparks*, 1 Scam. 122; *Duncan v. McAfee*, 3 Scam. 93; *Frame v. Frame*, 16 Ill. 155; *Durham v. S. P. Co.*, 87 Ill. 185; *Ins. Co. v. Kellogg*, 82 Ill. 614; *Lilly v. Shaw*, 59 Ill. 72; *Hotel Co. v. Johnson*, 57 Ill. App. 608; *Baldwin v. McClelland*, 152 Ill. 42.

² *Hawes v. People*, 129 Ill. 123.

³ *Ayer v. Chicago*, 149 Ill. 262; *Frew v. Danforth*, 126 Ill. 242; *Horner v. Horner*, 37 Ill. App. 199; *Coughran v. Gutchens*, 18 Ill. 390;

McCormick v. Wheeler, 36 Ill. 114; *Becker v. Sauter*, 89 Ill. 596.

⁴ *Ayer v. Chicago*, 149 Ill. 262; *O'Connor v. Mullen*, 11 Ill. 116; see *Coughren v. Gutchens*, 18 Ill. 390; *Rauh v. Ritchie*, 1 Bradw. 188; *Swift v. Allen*, 55 Ill. 303; *Lilly v. Shaw*, 59 Ill. 72; *Mains v. Cosner*, 67 Ill. 536; *Ives v. Hulse*, 17 Bradw. 30; *Gibbie v. Mooney*, 121 Ill. 255.

⁵ *Wooters v. Joseph*, 137 Ill. 113.

⁶ *Planing Mill Co. v. Bank*, 97 Ill. 294; see also, Powell on Appellate Proceedings, Appendix, p. 387, note 1; *Fielden v. People*, 128 Ill. 595.

There is no error in allowing the amendment of the declaration after verdict, and pending a motion for new trial, by the filing of additional counts upon the same cause of action upon which the suit was brought.¹

Amendment of pleadings in vacation.—By the “act to extend the powers of judges of circuit courts in vacation,” (1872,) the judges, within their respective circuits, have power in vacation to permit amendments to pleadings; and this may be done during a term of court held in another county than that in which the suit is pending. The party applying must give at least seven days’ notice to the opposite party, or his attorney of record. Any order made in pursuance of such application must be signed by the judge, and filed and entered of record by the clerk of the court in which the proceedings are had, and will take effect from the date of such filing.²

Amendment of process out of term.—The Practice Act provides that “a party intending to move, out of term, to set aside or quash any execution, replevin bond, or other proceedings,” may obtain a certificate from the judge, staying further proceedings, etc. “But in no case shall the judge grant such certificate when the error complained of may, by the direction of the judge to the clerk issuing the process, be corrected, but the judge shall order the correction, and the clerk shall make the correction in the process as if ordered in term time.”³

Correction of errors in fact, after judgment.—The Practice Act also provides as follows: “The writ of error *coram nobis* is hereby abolished, and all errors in fact committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *feme covert*, *non compos mentis*, or under

¹ *Order of Mutual Aid v. Paine*, 122 Ill. 625.

² Rev. Stat. (1893) 437; 1 Starr & Curtis 710; Rev. Stat. (1895) 479; see *Keith v. Kellogg*, 97 Ill. 147.

³ 2 Starr & Curtis 1827; Rev. Stat. (1895) 1163; Rev. Stat. (1893) 1079; see *Keefer v. Mason*, 36 Ill. 406; *R. Co. v. Chenoa*, 43 Ill. 209.

duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years.”¹

Other statutory provisions.—There are various other provisions in the statutes concerning amendments in particular cases; as for filing a sufficient affidavit or bond, or amending the writ, in proceedings by attachment;² for supplying a sufficient bond, on appeal to the supreme court;³ for amending awards,⁴ and for amending appeal bonds, on appeals from justices of the peace.⁵

By section 61 of the Practice Act (1872), exceptions may be taken to decisions of the court in overruling *motions to amend*; and any decision so excepted to may be assigned for error.⁶

Leave to amend pleadings necessary to present an issue on the merits of a cause, is no longer discretionary with the court, but is a legal right of the party, and when proper application is made for leave to amend pleas, on sustaining a demurrer thereto, the court has no right to require the defendant to show by an affidavit, of facts, in detail, a meritorious defense to plaintiff's action. Such terms can not be imposed as a condition of amending pleas under the statute authorizing amendments.⁷

Changing cause from law to chancery.—Courts of chan-

¹ Rev. Stat. (1893) 1080; 2 Starr & Curtis 1831; Rev. Stat. (1895) 1164; see *Fix v. Quinn*, 75 Ill. 232; *Coursen v. Hixon*, 78 Ill. 339; *Mains v. Cosner*, 67 Ill. 536; *Ins. Co. v. Fassett*, 102 Ill. 315; *Morrison v. Stewart*, 21 Ill. App. 113.

² Rev. Stat. (1893) 173; 1 Starr & Curtis 322; Rev. Stat. (1895) 177; see *Beecher v. James*, 2 Scam. 462; *Roberts v. Dunn*, 71 Ill. 46.

³ 2 Starr & Curtis 1834; Rev. Stat. (1895) 1164; Rev. Stat. (1893) 1080; see *Gillilan v. Gray*, 13 Ill. 705; *Carroll v. City*, 2 Bradw. 481.

⁴ 1 Starr & Curtis 304; Rev. Stat. (1895), 167; Rev. Stat. (1893), 164; see *Howell v. Howell*, 26 Ill. 460; *Farr v. Johnson*, 25 Ill. 522.

⁵ Starr & Curtis 1456; Rev. Stat. (1895) 973; Rev. Stat. (1893) 910; see *Swafford v. People*, 1 Scam. 289; *Crain v. Bailey*, 1 Scam. 321; *Hubbard v. Freer*, 1 Scam. 467; *Walsh v. People*, 12 Ill. 77; *Harlan v. Scott*, 2 Scam. 65; *Lea v. Vail*, 2 Scam. 473; *Patty v. Winchester*, 20 Ill. 261; *Slaten v. People*, 21 Ill. 27; *Weist v. People*, 39 Ill. 507; *Rider v. Bagley*, 47 Ill. 365; *Tedrick v. Wells*, 152 Ill. 214.

⁶ 2 Starr & Curtis 1826; Rev. Stat. (1893), 1079; Rev. Stat. (1895), 1163.

⁷ *Ins. Co. v. Trust Co.*, 1 Bradw. 391; see *March v. Mayers*, 85 Ill. 177; *Hays v. Loomis*, 84 Ill. 18; *Misch v. McAlpine*, 78 Ill. 507; *Thomas v. Ins. Co.*, 108 Ill. 91.

cery and courts of law are, in this state, distinct tribunals. Though they may be presided over by the same judge, they possess separate and distinct jurisdiction. Therefore it would be improper to change an action at law to a suit in chancery.¹

Judgments after term.—Where a judgment has been inadvertently entered for the plaintiff instead of for the defendant, an amendment may be allowed upon motion, even after the expiration of the term, *nunc pro tunc*.²

Bills of exceptions.—Where a bill of exceptions, through inadvertence or mistake, is incorrect, it may, on due notice, at a subsequent term, be amended.³

Defects cured by pleading to the merits.—It is the well settled doctrine that many defects which might have been fatal on demurrer are waived and cured by pleading to the merits. After plea filed, a declaration will receive a reasonable interpretation.⁴

Defective pleadings cured by verdict.—Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission will be cured by the verdict;⁵ but where no cause of action is stated, the omission is not cured by the verdict and the objection may be urged in arrest or on error.⁶

¹ *Lullman v. Barrett*, 18 Bradw. 573.

² *Morrison v. Stewart*, 21 Ill. App. 113; *Ives v. Hulse*, 17 Bradw. 30; Freeman on Judgts., Sec. 70.

³ *Heinsen v. Lamb*, 117 Ill. 550; *People v. Anthony*, 129 Ill. 218; *Wright v. Griffey*, 146 Ill. 394; *R. Co. v. Levy*, 57 Ill. App. 365.

⁴ *Railway Co. v. Hessions*, 150 Ill. 546.

⁵ 1 Chit. Pl. (7 Am. Ed.) 711-712; And. Steph. Pl. 225; *Keegan v. Kinnare*, 123 Ill. 280; *R. R. Co. v. Hines*, 132 Ill. 161; *Shreffler v. Nadelhoffer*, 133 Ill. 536; *R. R. Co. v. Feehan*, 149 Ill. 202; *R. R. Co. v. Wills*, 140 Ill. 614.

⁶ *Shreffler v. Nadelhoffer*, 133 Ill. 536; *Bowman v. People*, 114 Ill. 474; *Rothschild v. Bouscke*, 131 Ill. 265; Gould's Pl., Sec. 22; Chit. Pl. (7th

Where a defendant goes to trial without any answer to one of his pleas, and without moving for judgment thereon, he thereby waives the necessity for a formal issue, and the irregularity will be cured by the verdict.¹

Authorities.—For a comprehensive and instructive dissertation upon the subject of amendments, the pleader may with profit consult Andrews' *Stephen's Pleadings* (editor's note to note 33, appendix, page 473), where the various statutes upon the subject and the history thereof may be found.

Am. Ed.) 712, *713; And. Steph. Pl.
225; *Stearns v. Cape*, 109 Ill. 340;
Ins. Co. v. Kirkpatrick, 61 Ill. App.
74.

¹ *Shreffler v. Nadelhoffer*, 133 Ill.
536; *Funk v. Babbitt*, 156 Ill. 408.

CHAPTER XXIV.

CONTINUANCES.

It is in the power of the court, generally, to grant a continuance to either party, upon sufficient cause shown.¹

The application is addressed to the sound discretion of the trial court, whose action in refusing same can not be assigned for error, unless it is evident that such discretion has been abused.²

How and when applied for.—An application for a continuance is made by motion, based on the affidavit of the party, or of some other person acting for him. The motion is often made orally, though the better practice is to make all motions in writing. If the application is granted, the fact is minuted on the docket. The motion should be made as soon as possible after the commencement of the term, or after the cause of continuance is known to exist.³

For want of testimony.—The want of material testimony, which the party has used due diligence to obtain, and which he can probably procure at a future term, is a good cause for a continuance of the suit. The Practice Act provides, in this regard, as follows:

“When either party shall apply for a continuance of a cause on account of the absence of testimony, the motion shall be grounded on the affidavit of the party so applying, or his authorized agent, showing that due diligence has been used to obtain such testimony, or the want of time to obtain it, and what particular fact or facts the party expects to prove by such

¹ *Hall v. Reber*, 36 Ill. 483; *Crosby v. Kiest*, 135 Ill. 458.

² *Aid Ass'n v. Prim*, 19 Ill. App. 224; *Pardridge v. Wing*, 75 Ill. 236; *Hahn v. Huber*, 83 Ill. 244; *Ault v. Rawson*, 14 Ill. 484; *Harris v. Rose*, 26

Ill. App. 237; *Farrell v. McKee*, 36 Ill. 228; *Penn. Co. v. Rudel*, 100 Ill. 603.

³ See *McCarthy v. Mooney*, 41 Ill. 300; *Grier v. Gibson*, 36 Ill. 521.

evidence; and if the evidence is the testimony of a witness, his place of residence, or if his place of residence is not known, showing that due diligence has been used to ascertain the same, and that if further time is given his place of residence can be ascertained.¹

“Should the court be satisfied that such evidence would not be material on the trial of the cause, or if the other party will admit the affidavit in evidence, the cause shall not be continued.

“When the affidavit is concerning the evidence of a witness, the party admitting such affidavit shall be held to admit only that if the absent witness were present, he would testify as alleged in the affidavit, and such admission shall have no greater force or effect than if such absent witness were present and testified as alleged in the affidavit, leaving it to the party admitting such affidavit to controvert the statements contained therein, or to impeach said witness, the same as if such witness were present and examined in open court.”²

The form of the affidavit for a continuance, on account of the absence of a witness, may be as follows:

No. 363. *Affidavit by defendant for continuance, on account of absence of witness.*³

In the ——— Court.

—— Term, 18——.

C. D. }
ats. } *Assumpsit.*
A. B. }

C. D., the above named defendant, makes oath and says that he can not safely proceed to the trial of this cause at the present term of this court, on account of the absence of one J. K., who resides in ———, and is a material

¹ 2 Starr & Curtis 1809; Rev. Stat. (1893) 1177; Rev. Stat. (1895) 1161; see *Slade v. McClure*, 76 Ill. 319; *Wray v. People*, 78 Ill. 212; *Conley v. People*, 80 Ill. 236; *Lockhart v. Wolf*, 82 Ill. 37; *School Dir. v. Hentz*, 57 Ill. App. 648; *Ry. Co. v. Duffin*, 126 Ill. 100.

² Starr & Curtis 1811; Rev. Stat. (1893) 1077; Rev. Stat. (1895) 1161; see *Graff v. Brown*, 85 Ill. 89; *Montgom-*

ery v. Robinson, 85 Ill. 174; *Ry. Co. v. Clark*, 70 Ill. 276; *Slate v. Eisenmeyer*, 94 Ill. 96; *Hart v. Seymour*, 147 Ill. 598.

³ See *Lee v. Bates*, 1 Scam. 528; *Adams v. Colton*, 2 Scam. 71; *Allen v. Downing*, 2 Scam. 454; *Wade v. Halligan*, 16 Ill. 508; *Miles v. Danforth*, 32 Ill. 59; *Gingrich v. People*, 34 Ill. 449; *Morgan v. Raymond*, 38 Ill. 449.

witness on the part of this affiant. And this affiant further says, that he expects to prove by the said J. K., that (*here set forth what is expected to be proved by the witness.*) And this affiant further says, that (*here set forth what diligence has been used to procure the attendance or testimony of the witness, and to ascertain his place of residence, if alleged to be unknown.*) And this affiant further says, that he knows of no other person or persons by whom he can so fully prove the matters above set forth; [that if further time is given, the place of residence of the said J. K. can be ascertained;] that this affiant expects to procure the testimony of the said J. K. at the next term of this court; and that this application is not made for delay, but that justice may be done.

C. D.

Subscribed and sworn, etc.

Where a party moves for a continuance on the ground of the absence of material testimony, he should show in his affidavit what the testimony would be; and if the court thinks it material, a continuance will be granted.¹

If an affidavit is merely filed, and no motion is founded thereon, it is not the duty of the court to grant the continuance.²

A motion for a continuance founded upon the absence of witnesses, will be refused, if the facts to be proved are not material to the issue in the cause.³

An affidavit for a continuance which does not show the residence of a witness, is insufficient. This is indispensable, as connected with his identification and the diligence used to obtain his attendance.⁴

A person desiring a continuance of a cause is bound to show that he has made reasonable exertions to prepare for the trial, without success, or some good reason for not making such exertions.⁵ But each case depends upon the particular

¹ *Pence v. Christman*, 15 Ind. 257; see *McKichan v. McBean*, 45 Ill. 228; *Long v. People*, 135 Ill. 435.

² *Burlingame v. Turner*, 1 Scam. 589; *Ilet v. Collins*, 102 Ill. 402.

³ *Dodge v. Deal*, 28 Ill. 303; *Grundies v. Bliss*, 86 Ill. 132; *Hodges v. Nash*, 141 Ill. 391; *Stringam v. Parker*, 56 Ill App. 36; *Long v. People*, 135 Ill. 435.

⁴ *Lee v. Quirk*, 20 Ill. 392; *Smith v. Powell*, 50 Ill. 21; see *Richardson v. People*, 31 Ill. 170; *Lockhart v. Wolf*, 82 Ill. 37; *Shirwin v. People*, 69 Ill. 55.

⁵ *Dunlap v. Davis*, 5 Gilm. 85; *Cole v. Choteau*, 18 Ill. 439; *Moore v. Goelitz*, 27 Ill. 18; *Richardson v. People*, 31 Ill. 170; *Day v. Gelston*, 22 Ill. 103; *Meyers v. Andrews*, 87 Ill. 433;

circumstances shown. A party does not show diligence if he relies upon making his proof by the deposition of a witness who, upon examination, disappoints him. It is his duty to inform himself as to the knowledge of the witness; and if such witness does not possess the requisite information, the party should procure the testimony he requires from other witnesses, if any can be found.¹

A continuance will not be granted because a witness has said that he would be present at the trial, and that he had been served with *subpœna* on behalf of the opposite party. The party desiring the testimony of a witness should secure his presence at the trial.²

Where a witness could not come, on account of sickness in his family, and therefore his attendance could not have been procured by *subpœna*, it was held that it did not matter whether he had been served or not, and that a continuance ought to have been granted.³

When a continuance has once been granted, on affidavit, another continuance should not be granted, where even ordinary efforts have not been made to obtain the testimony of the witnesses, and their absence is not accounted for.⁴ Greater diligence should be required on a second or third application for a continuance, than on the first application. The fact that a party applies for the continuance of a cause a second time, on account of the absence of the same witness, might create the suspicion that the party was not sufficiently anxious for his attendance to make the necessary efforts to procure it; and evidence of greater diligence will be required than on a first

Pardridge v. Wing, 75 Ill. 236; *Ins. Co. v. Nelson*, 75 Ill. 548; *Richards v. Glennon*, 71 Ill. 11; *Coffey v. Fosselman*, 72 Ill. 69; *Sutton v. People*, 119 Ill. 250; *Johnson v. Glover*, 19 Ill. App. 585; *Ass'n v. Prim*, 19 Ill. App. 224; *Trask v. People*, 151 Ill. 523.

¹*Cole v. Choteau*, 18 Ill. 439; *Grundies v. Bliss*, 86 Ill. 132; *Meyers v. Andrews*, 87 Ill. 433; *Freeport v. Isbell*, 93 Ill. 381.

²*Moore v. Goelitz*, 27 Ill. 18; *Gass v. Howard*, 43 Ill. 223; *Walker v. Douglas*, 70 Ill. 445; *Fisher v. Greene*, 95 Ill. 94.

³*Allen v. Downing*, 2 Scam. 455; see *Ins. Co. v. Mfg. Co.*, 1 Gilm. 236; *Searls v. Munson*, 17 Ill. 558; see *Schnell v. Rothbath*, 71 Ill. 83.

⁴*McConnell v. Johnson*, 2 Scam. 522; *Shook v. Thomas*, 21 Ill. 87; *Slade v. McClure*, 76 Ill. 319; *Wilson v. King*, 83 Ill. 232.

application; and still greater diligence should be shown on each successive application.¹ The party should, on the second application, be required to show something more than a mere service of a *subpœna*; he should avail himself of other legal means to compel the attendance of the witness. If such witness is within the reach of the court, the party should apply for an attachment to compel his attendance, as soon as he fails to attend under the *subpœna*. The affidavit should state that the witness is not absent by the consent of the party; and also that the party expects to procure the evidence of the witness by the next term. The affidavit should also state that the party has no other witness by whom the same facts can be proved;² or if there is a disputed point, and numerous witnesses are to be examined, show that fact, or that there is a question of identity upon which there will be a contrariety of evidence. This is necessary in order to show the materiality of the testimony of the witness.³

If the testimony of the absent witness is important only in connection with certain facts, those facts should be set forth or referred to in the affidavit, so that the materiality of the evidence may be apparent to the court.⁴ The affidavit should set forth the facts expected to be proved with such certainty that the opposite party can, if he thinks proper, admit the affidavit and go to trial.⁵ Where a party relies upon the promise of a witness to be present at the trial, he can not obtain a continuance if the witness does not attend.⁶ To justify the continuance of a cause by reason of the absence of a wit-

¹ *Brewing Ass'n v. Hutmacher*, 127 Ill. 652; *Slade v. McClure*, 76 Ill. 319; *Wilson v. King*, 83 Ill. 232.

² *Hodge v. Nash*, 141 Ill. 391; *Com. v. Barber*, 62 Ill. App. 108.

³ *Shook v. Thomas*, 21 Ill. 87; *Eames v. Hennessy*, 22 Ill. 628; *Morgan v. Raymond*, 38 Ill. 449; *Birks v. Houston*, 63 Ill. 77; *Coffey v. Fosselman*, 72 Ill. 69; *Corbin v. People*, 131 Ill. 615.

⁴ *Bailey v. Hardy*, 12 Ill. 459; see *Marble v. Bonhotel*, 35 Ill. 240; *Grundies v. Bliss*, 86 Ill. 132.

⁵ *McBain v. Enloe*, 13 Ill. 76; *Moody v. People*, 20 Ill. 315; see *Hopkinson v. Jones*, 28 Ill. App. 409.

⁶ *Day v. Gelston*, 22 Ill. 103; see *Gass v. Howard*, 43 Ill. 223; *Walker v. Douglas*, 70 Ill. 445; *Lockhart v. Wolf*, 82 Ill. 37.

ness, something more than writing letters, and making inquiries as to his residence, etc., is required.¹

Where a continuance is sought on account of the absence of a party in interest who is expected to testify as a witness, a higher degree of diligence is required to procure his attendance or deposition than where the absent witness is a stranger to the suit.² Affidavits in support of a motion for a continuance based upon the absence of a party to the suit through ill health, should set up his expectation as to returning, or the probability of obtaining his testimony at some future time.³

An application for a continuance on the ground of the absence of a material witness, stating that witness left the country and that the applicant was unable to ascertain his residence, but not showing that if further time were given his place of residence could be ascertained, is insufficient for that reason and properly denied.⁴

An application for a continuance on account of the absence of a witness, should not only show diligence, but that there is no other witness to prove the same facts, and that the witness may be in attendance at another term. A delay of six months, without having a *subpœna* issued for a witness, shows a want of diligence.⁵ An affidavit which shows that the witnesses have been duly required by *subpœna* to attend the court at which the trial is to be had, shows sufficient diligence in that respect. The court may ascertain whether a witness is present, and if he is, may overrule the application for continuance.⁶

If a witness resides in another county than that in which the court is held, it must appear that his fees have been tendered or paid to him, before a party can have a continuance on the ground of his not appearing after being summoned.

¹ *Stevenson v. Sherwood*, 22 Ill. 238; *Richards v. Glennon*, 71 Ill. 11; *Cook v. Norwood*, 106 Ill. 558.

² *Mantonya v. Huerter*, 35 Ill. App. 27.

³ *Mantonya v. Huerter*, 35 Ill. App. 27.

⁴ *Heitschmidt v. McAlpine*, 59 Ill. App. 231.

⁵ *Eames v. Hennessy*, 22 Ill. 628; see *Richardson v. People*, 31 Ill. 170; *Glass v. Howard*, 43 Ill. 223; *McKichan v. McBean*, 45 Ill. 228; *Jarvis v. Shacklock*, 60 Ill. 378; *Grun-dies v. Bliss*, 86 Ill. 132; *Dunn v. People*, 109 Ill. 635; *Adams v. People*, 109 Ill. 444.

⁶ *Wade v. Halligan*, 16 Ill. 507.

Where the affidavit does not pretend to show a case within the statute, entitling the party to a continuance as a matter of right, the application is at most addressed to the discretion of the court to which it is made.¹

The granting of a continuance by a court can not be assigned for error.²

The amending of affidavits for continuance is highly improper, and should not be allowed.³

Counter-affidavits can not be received and considered on an application for continuance.⁴

By reason of amendment.—No amendment will be a cause for a continuance unless it appears by affidavit that the opposite party is unprepared to proceed to or with the trial of the cause, etc.⁵

For failure to file declaration, etc.—As to continuance for want of declaration, or copy of instrument or account, filed in time, see page 29, *ante*.

The defendant is entitled to a continuance, if the plaintiff does not file a copy of his account ten days before the term, where he has common counts in his declaration, as well as a special count on a note. If the plaintiff desires to avoid a continuance, he can stipulate that he will rely alone on the note, or he can enter a *nolle prosequi* as to the common counts.⁶

¹ *Ault v. Rawson*, 14 Ill. 484; *R. R. Co. v. McLaughlin*, 63 Ill. 389; *Shirwin v. People*, 69 Ill. 55.

² *Brooks v. McKinney*, 4 Scam. 309; *Loeffner v. State*, 10 Ohio (State), 598.

³ *McBain v. Enloe*, 13 Ill. 76; see *Stockley v. Goodwin*, 78 Ill. 127; *Peru Coal Co. v. Merrick*, 79 Ill. 112; *Aid Ass'n v. Primm*, 124 Ill. 100.

⁴ *Wick v. Weber*, 64 Ill. 167; *Whig v. Tillsan*, 67 Ill. 351; *Waarich v. Winter*, 33 Ill. App. 36.

⁵ 2 Starr & Curtis 1788; Rev. Stat. (1893), 1074; Rev. Stat. (1895), 1158; see *Dobbins v. Higgins*, 78 Ill. 440; *Crist v. Wray*, 76 Ill. 204; *Mills v.*

Executors, 76 Ill. 381; *Ry. Co. v. Stein*, 75 Ill. 41; *Cassem v. Galvin*, 158 Ill. 30; *Wolfe v. Johnson*, 152 Ill. 280; *Moshier v. Knox College*, 32 Ill. 156; *Kagay v. School Trustees*, 68 Ill. 75; *Lindsey v. Lindsey*, 40 Ill. App. 389; *Rockford, etc., R. Co. v. Phillips*, 66 Ill. 549; *Martin v. Eversal*, 36 Ill. 222; see also *Phillips v. Edsall*, 127 Ill. 537; *Downey v. O'Donnell*, 92 Ill. 559; *Driver v. Ford*, 90 Ill. 595; *Clause v. Bullock Printing Press Co.*, 20 Ill. App. 113; *Chicago, etc., R. Co. v. Goyette*, 32 Ill. App. 574; *Lewis v. Lanphere*, 79 Ill. 188.

⁶ *Hawthorn v. Cooper*, 22 Ill. 225; *McCarthy v. Neu*, 91 Ill. 127.

Where a suit is brought by an indorsee of a promissory note, it is sufficient to file a copy of the note. The filing of a copy of the indorsement is not necessary.¹

Defendant in military service.—The Practice Act also provides that it shall be a sufficient cause for a continuance, in time of war or insurrection, that the defendant is in the military service of the United States, or of the State of Illinois, if it shall be made to appear to the court, by affidavit, that the presence of the defendant is in any degree necessary to a full and fair defense of the suit.²

Party or counsel in the legislature.—It is further provided by the Practice Act, that in any suit pending while the General Assembly is in session, it shall be a sufficient cause for a continuance if it shall appear to the court, by affidavit, that the party applying, or any attorney, solicitor or counsel of such party, is a member of either house of the General Assembly, and actually attending the sessions of the same, and that the attendance in court of such party or counsel, etc., is necessary to a fair and proper trial of such suit. When continued for this reason, no trial or other proceedings will be had in the cause until the adjournment of the legislature, nor within ten days thereafter. This provision does not apply unless the employment of the counsel, etc., was before the commencement of the session of the legislature.³

On remanding of cause from supreme court.—A party is not entitled to a continuance, as a matter of right, because the mandate and opinion of the supreme court, on remanding the cause, were not filed ten days before the term. He is only entitled to sufficient time to prepare for trial.⁴

Terms.—The court may in general impose any terms, on granting a continuance, which the justice of the case may re-

¹ See *Farney v. True*, 26 Ill. 185; *Roberts v. Thompson*, 28 Ill. 80.

² 2 Starr & Curtis 1811; Rev. Stat. (1895) 1161; Rev. Stat. (1893) 1077; see *Duncan v. Niles*, 32 Ill. 541.

³ Rev. Stat. (1893) 1077; Rev. Stat. (1895) 1161; 2 Starr & Curtis, 1811; see *Stockley v. Goodwin*, 78 Ill. 127; *Wicker v. Boynton*, 83 Ill. 545;

Williams v. Baker, 67 Ill. 238; *Ry. Co. v. Teeters*, 68 Ill. 144; *Joiner v. Drain. Com.*, 17 Bradw. 607; *Harrigan v. Turner*, 53 Ill. App. 292; *C. P. S. Ex. v. McLaughrey*, 148 Ill. 372; *McClory v. Crawley*, 59 Ill. App. 392; *Ware v. City*, 158 Ill. 234.

⁴ *Dodge v. Deal*, 28 Ill. 303.

quire. If the cause may be tried at the term, the party obtaining a continuance usually has to pay the costs of the term—as in cases of continuance for want of witnesses; but where application is made on account of a failure to file the declaration, or a copy of the instrument or account sued on, the continuance is (by the statute) at the costs of the plaintiff. Where the continuance is general, the costs will abide the result of the suit.¹

By operation of law.—It is the general rule that all causes undisposed of at the end of a term are continued by operation of law until the next succeeding term, and that the entry of an order for continuance is not necessary.²

¹ See *Collins v. Tuttle*, 24 Ill. 623. 255; *Poyer v. Des Plaines*, 124 Ill.

² *Updike v. Armstrong*, 3 Scam. 310; *Shannahan v. Stevens*, 139 Ill. 564; *Matson v. Swanson*, 131 Ill. 428.

CHAPTER XXV.

JURY.

Right of trial by.—It is declared by the constitution of Illinois, that “the right of trial by jury, as heretofore enjoyed, shall remain inviolate.”¹

The provision in the constitution preserving the right to trial by jury, has no reference to cases in which courts of equity have jurisdiction.²

Nor was it intended to introduce jury trials in special summary jurisdictions which were unknown to the common law, and which do not provide expressly for that mode of trial.³

Where jurisdiction is bestowed by statute upon a court of chancery in a case where there existed before the adoption of the constitution a remedy at law, under which was given the right of trial by jury, it is presumed such trial would be allowed, if asked, on a trial in chancery, and obedience paid to the constitutional provision giving such right.⁴

It is only where the evidence is conflicting as to the issues of fact in a chancery suit, that it is proper to submit such issues to a jury.⁵

In the trial of questions of facts in all common law cases in the county court, either party is entitled to a jury.⁶

That portion of section 36 of chapter 51 of the revised statutes of Illinois, which provides for the punishment in a summary manner of a person who shall refuse to obey a sub-

¹ Const. Ill., Art. 2, Sec. 5; see *Ins. Co. v. Scammon*, 123 Ill. 601; *Harris v. People*, 123 Ill. 585; *Puterbaugh v. Smith*, 131 Ill. 199.

² *People v. Abbott*, 105 Ill. 588; *Heacock v. Hosmer*, 109 Ill. 245; *Flaherty v. McCormick*, 113 Ill. 538; *Culver v. Colehour*, 115 Ill. 558.

³ *Ward v. Farwell*, 97 Ill. 614, and

cases there cited; *Briggs v. Drain. Comm.*, 140 Ill. 53; *Whitehurst v. Coleen*, 53 Ill. 247; *In re Ferrier*, 103 Ill. 367; *Holnback v. Wilson*, 159 Ill. 148.

⁴ *Gage v. Ewing*, 107 Ill. 1.

⁵ *Tillotson v. Mitchell*, 111 Ill. 518.

⁶ *Mascall v. Drain. Comm.*, 122 Ill. 620.

poena to appear and have his deposition taken, has been declared to be unconstitutional as depriving the defendant of the right of a trial by jury.¹

Who are competent jurors.—The statute of Illinois (section 2 of the “act concerning jurors,”) requires that the county board, in selecting from the jury list the persons who may be drawn as jurors for any term, “shall choose a proportionate number from the residents of each town or precinct, and shall take the names of such only as are: 1. Inhabitants of the town or precinct, not exempt from serving on juries. 2. Of the age of twenty-one years or upwards, and under sixty years old. 3. In the possession of their natural faculties, and not infirm or decrepit. 4. Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language.”²

“When bystanders are summoned to fill the panel for a pending trial, they are to be persons having the qualifications of jurors.”³

Who are exempt.—“The governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney-general, members of the general assembly during their term of office, all judges of courts, all clerks of courts, sheriffs, coroners, postmasters, mail carriers, practicing attorneys, all officers of the United States, officiating ministers of the gospel, school teachers during the terms of school, practicing physicians, constant ferrymen, mayors of cities, policemen and active members of the fire department,” are in Illinois exempt from serving as jurors.⁴ And “if a person has served on a jury in a court of record within one year, he shall be exempt from again serving during such year, unless he waives such exemption.”⁵

¹ *Puterbaugh v. Smith*, 131 Ill. 199.

² 2 Starr & Curtis 1417; Rev. Stat. (1893) 892; Rev. Stat. (1895) 942; see *In re Scranton*, 74 Ill. 161; *Buckrice v. People*, 110 Ill. 29.

³ 2 Starr & Curtis 1421; Rev. Stat. (1893) 894; Rev. Stat. (1895) 944.

⁴ 2 Starr & Curtis 1418; Rev. Stat. (1893) 892; Rev. Stat. (1895) 942; see *Bragg v. People*, 78 Ill. 328; Appeal of *Scranton*, 74 Ill. 161.

⁵ 2 Starr & Curtis 1422; Rev. Stat. (1893) 894; Rev. Stat. (1895) 944.

Challenges of jurors.—Challenges are of two principal kinds: namely, *challenges to the array*, and *challenges to the polls*.

Challenges to the array.—A challenge to the array is made on account of some defect in executing the *venire*, and is at once an objection to all the jurors in the panel. It is either a principal challenge, that is, one founded on some manifest partiality, or error committed in selecting, drawing or summoning the jurors, by not pursuing the directions of the acts of the legislature; or it is a challenge for favor.¹

In Illinois, under the system established by the statute of selecting a certain number of persons to serve as jurors for each week of the term, it is presumed there will seldom be occasion for a challenge to the regular panel.² But where the sheriff summons talesmen, after the regular panel is exhausted, the common law objections may no doubt be made available.

A mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array, unless the irregularity complained of is of such a character as would probably have produced a change in the panel or presented a list of names to choose from, different from those which would be produced by a compliance with the law,³ and that a positive injury would result in consequence of the refusal of the court to quash the panel.⁴

Objections to any irregularity in the impaneling of a petit jury can not be interposed for the first time on error.⁵

Among the causes for challenge to the array are the following, viz.: That the sheriff or officer who makes the array is of kindred or affinity to either party, within the ninth degree; if one or more of the jury are returned at the request of either party; that an action implying malice is pending in the suit of either party against the officer, or at suit of the officer against either party; that an action of debt is pending at the

¹ Bouv. L. D. 217; see *Stone v. People*, 2 Scam. 326; *Lincoln v. Stowell*, 73 Ill. 246; *Ins. Co. v. Nelson*, 75 Ill. 548; *Siebert v. People*, 143 Ill. 571; *Cleaves v. Stanley*, 34 Ill. App. 338.

² See *Murphy v. People*, 37 Ill. 447; *Stone v. People*, 2 Scam. 326;

Wilhelm v. People, 72 Ill. 468; *R. R. Co. v. Wheeler*, 72 Ill. 538; *Mapes v. People*, 69 Ill. 523.

³ *Nealon v. People*, 39 Ill. App. 481.

⁴ *People v. Madison Co.*, 125 Ill. 334.

⁵ *Schirmer v. People*, 33 Ill. 276.

suit of either party against the officer; but not if by the officer against either party; that the officer is under the distress of either party; that the officer is counsel, attorney or servant of either party, or is an arbitrator in the same matter, and has treated thereof.¹

The causes of challenge to the array for favor, are such as imply, at least, a probability of bias and partiality in the officer, but do not amount to a principal challenge; thus, that the plaintiff or defendant is the tenant of the officer, or that the son of the officer has married the daughter of the plaintiff or defendant.²

An objection to the mode of summoning a grand jury or petit jury, should be made by a challenge to the array, or by motion to quash the indictment, etc., founded upon an affidavit of some irregularity. Advantage can not be taken of such irregularity on a motion for a new trial.³

Challenges to the polls.—Challenges to the polls are exceptions made separately to each juror, before he is sworn. These may be divided, under the practice of Illinois, into two kinds—*challenges for cause*, and *peremptory challenges*.

Challenges for cause.—It is a good cause for challenge that a juror is an alien;⁴ or an infant; or *non compos*; or that he has not the requisite understanding or character; or that he is of kin to either party within the ninth degree;⁵ or that the juror is interested;⁶ or has formed and expressed an opinion of the controversy,⁷ or upon any one principal point in the case;⁸ but not when he merely expresses a conditional opinion.⁹

¹ *Watkins v. Weaver*, 10 Johns. 107; *Foot v. Morgan*, 1 Hill 654; *Cain v. Ingham*, 7 Cow. 479, note a.

² Co. Lit. 156; *Hanna v. People*, 86 Ill. 243.

³ *Stone v. People*, 2 Scam. 326; see *Schirmer v. People*, 33 Ill. 276; *Beasley v. People*, 89 Ill. 571; *R. R. Co. v. Casner*, 72 Ill. 384; see *Mulder v. Rebham*, 94 Ill. 142.

⁴ *Davison v. People*, 90 Ill. 221; *Chase v. People*, 40 Ill. 352; *Guykowsky v. People*, 1 Scam. 476; *Stone v. People*, 2 Scam. 326.

⁵ *Finch* 401; *Thomas v. Leonard*,

4 Scam. 556; *Mackin v. People*, 115 Ill. 312.

⁶ 1 Bay 229; *People v. Hall*, 2 Tyler 401.

⁷ See *R. R. Co. v. Adler*, 56 Ill. 344; *Hughes v. People*, 116 Ill. 330; *Meaux v. Whitehall*, 8 Bradw. 173; *Ins. Co. v. Ward*, 90 Ill. 545; *R. R. Co. v. Perkins*, 125 Ill. 127.

⁸ *Burr's Trial* 418; *Davis v. Walker*, 60 Ill. 452.

⁹ *Durell v. Mosher*, 8 Johns. 445; *Graddle v. Hoffman*, 105 Ill. 147; *Richmond v. Roberts*, 98 Ill. 472.

A person over sixty years of age is exempt from jury service but his age does not disqualify him.¹

A court has a right to discharge a juror already sworn whenever it comes to its knowledge that he ought not to sit.²

By the statute of Illinois, it is a sufficient cause for challenge of a juror, that he lacks any one of the qualifications mentioned in the second section, above quoted, of that statute; or, if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any court of record in the county, within one year before the time he is offered as a juror, or that he is a party to a suit pending for trial at the same term.³

The law in relation to the disqualification of jurors, from having formed opinions, is very fully discussed in the case of *Smith v. Eames*, 3 Scam. R. 77, where the court says, that if a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties, or either of them, or from rumor, and that opinion is positive, and not hypothetical, and such as will probably prevent him from giving an impartial verdict, the challenge should be allowed. If the opinion is merely of a light and transient character, such as is usually formed by persons in every community upon hearing a current report, and may be changed by the relation of the next person met with—not a fixed conclusion and conviction of the mind—or if it is hypothetical, the challenge ought not to be allowed; and to ascertain the state of the mind of a juror, a full examination, if deemed necessary, may be permitted. The principles enunciated in this case have uniformly been adhered to by the courts of this state.⁴

The law gives the right to a peremptory challenge of jurors, to be exercised in the discretion of the party entitled, and the courts are not authorized to limit or restrict the right, or prescribe rules which shall render it unavailing. Such reasonable

¹ *Davis v. People*, 19 Ill. 73.

² *Thomas v. Leonard*, 4 Scam. 557;
Stone v. People, 2 Scam. 326.

³ 2 Starr & Curtis, 1422; Rev. Stat. (1893), 894; Rev. Stat. (1895), 944;
R. R. Co. v. Aldrich, 134 Ill. 9.

⁴ See *Gardner v. People*, 3 Scam.

88; *Sellers v. People*, 3 Scam. 415;
Vennum v. Harwood, 1 Gilm. 659;
Baxter v. People, 3 Gilm. 368; *Neeley v. People*, 13 Ill. 687; *Thomson v. People*, 24 Ill. 60; *Gray v. People*, 26 Ill. 344; *Collins v. People*, 48 Ill.

examination by counsel should always be allowed as will enable the court to see that the jurors stand indifferently between the parties, and are possessed of the requisite qualifications, and also to enable the counsel to challenge for cause, if it exists, or to exercise the right of peremptory challenge when in their judgment it is deemed necessary or advisable.¹

The court may also examine the jurors, if he sees fit to do so; and if not otherwise satisfied of their competency or impartiality, should always make such examination as will satisfy him thereof.²

It is proper upon the examination of a juror that he should be informed of the rule of law governing the application of a question asked; and if the same is asked to puzzle or trap him into disqualifying himself as a juror, it should not be allowed. When it appears from the examination of a juror that he has neither formed nor expressed an opinion, and has no prejudice or bias against either of the parties for any cause whatever, and can sit impartially and decide the issue involved in the case according to the evidence, such a person is a competent juror.³

The denial of permission, on the preliminary examination of jurors, to obtain from them, by means of hypothetical questions that call for the decision of a question of law, a pre-judgment of the case, and a statement in favor of which party they would decide on a supposed state of evidence, is not error.⁴

It is proper, on examination of a juror touching his qualifications, to ask him which way he will decide in case the evidence is equally balanced in a suit between a railroad company and an individual.⁵

A juror may be examined on his *voir dire*, as to such grounds of challenge only as are not to his discredit or dishonor; and the court, on motion of either party in a suit, will put any juror upon his oath, to answer whether he is in any

145; *Leach v. People*, 53 Ill. 311; *Carrow v. People*, 113 Ill. 550; *Wilson v. People*, 94 Ill. 299.

¹ *Donovan v. People*, 139 Ill. 412; *City v. Seibert*, 47 Ill. App. 477.

² *Donovan v. People*, 139 Ill. 412.

³ *R. R. Co. v. Fisher*, 38 Ill. App. 33.

⁴ *R. R. Co. v. Adler*, 56 Ill. 344; *R. R. Co. v. Buttolf*, 66 Ill. 347; *R. R. Co. v. Haslam*, 73 Ill. 494; *R. R. Co. v. Fisher*, 141 Ill. 614.

⁵ *R. R. Co. v. Haslam*, 73 Ill. 494; see *R. R. Co. v. Adler*, 56 Ill. 347; see also the case of *Coughlin v. People*, 144 Ill. 140, in which the ques-

way related to either party, or has formed and expressed an opinion in regard to the merits of the controversy, or has any particular interest or prejudice in the cause, or any other question concerning his competency. A party ought not to be forced to encounter a pre-existing opinion, deliberately formed, which the juror believes to be true, and which the party would be obliged to overcome.¹

The prejudice of a juror against a person not a party to the suit, can form no objection to his competency.²

It is a good cause of challenge that a juror (not of the regular panel) has served on a petit jury within twelve months.³

If a challenge or exception to a juror is not made at the time of impaneling, it can not be made afterwards; yet, if the court improperly overrules a challenge, the party challenging is not precluded, by proceeding in the trial, from availing himself of the objection on a motion to set aside the verdict.⁴ And where a juror was asked, before being sworn as a juror, whether he had made up an opinion upon the case, and he said no, but it was afterwards ascertained that he had formed and expressed an opinion upon the case before trial, the court gave the party a new trial.⁵

Peremptory challenges.—Peremptory challenges are those which are made without assigning any reason, and which the court must allow. In all civil actions, in Illinois, each party is entitled to a challenge of three jurors without showing cause for such challenge;⁶ and every person arraigned for any crime punishable with death, is admitted on his trial

tion of competency of jurors is fully discussed in an exhaustive opinion.

¹ *Gray v. People*, 26 Ill. 344; *Plummer v. People*, 74 Ill. 361; see *R. R. Co. v. Adler*, 56 Ill. 344.

² *Strawn v. Cogswell*, 28 Ill. 457; see *Albrecht v. Walker*, 73 Ill. 69; *Kroer v. People*, 78 Ill. 294; *Robinson v. Randall*, 82 Ill. 521; *Robinson v. Randall*, 82 Ill. 521.

³ 2 Starr & Curtis 1422; Rev. Stat.

(1893), 894; Rev. Stat. (1895), 944; see *Bissell v. Ryan*, 23 Ill. 566; *Brooks v. Bruyn*, 35 Ill. 392; *Amick v. Young*, 69 Ill. 542.

⁴ *Blake v. Millspaugh*, 1 Johns. 316.

⁵ *Vennum v. Harwood*, 1 Gilm. 659; see *Fitzpatrick v. Joliet*, 87 Ill. 58.

⁶ 2 Starr & Curtis, 1812; Rev. Stat. (1893) 1070; Rev. Stat. (1895) 1161.

to a peremptory challenge of twenty jurors, and no more; and every person arraigned for any offense that may be punished by imprisonment for a term exceeding eighteen months, to a peremptory challenge of ten jurors; and in all other criminal trials the defendant is allowed a peremptory challenge of six jurors. The attorney prosecuting on behalf of the People is admitted to a peremptory challenge of the same number.¹

Under the statute, in a case where several persons are jointly indicted and put upon trial, each being entitled to twenty peremptory challenges, the prosecution is entitled to a number equal to the aggregate of those accorded to all the defendants.²

Under our statute requiring "that the jury shall be passed upon and accepted in panels of four, by the parties, commencing with the plaintiff," after a panel of four jurors has been passed upon and accepted by both parties, and another panel is called, a party having peremptory challenges will not have the right to go back and challenge any one of the jurors so accepted, although they have not been sworn. Whatever may have been the rule at common law, as to the exercise of the right of peremptory challenge at any time before the jury is sworn, under our statute the right of peremptory challenge is cut off with respect to any one of a panel of four jurors which has been passed upon and accepted by both parties.³

Polling the jury.—To poll a jury is to require that each juror shall himself declare what is his verdict.

A party has the right to have the jury polled on the receipt of the verdict, whether it is brought in sealed, or delivered orally by the foreman. This right, however, must be exercised before the jury is discharged.⁴ After a verdict is received, and the jury discharged, the control of the jury over the case is at an end, and the jurors can not be recalled to alter or amend the verdict.⁵

¹ 2 Starr & Code, 1812; Rev. Stat. (1893) 1070; Rev. Stat. (1895) 1161.

² *Spies v. People*, 122 Ill. 1.

³ *Mayers v. Smith*, 121 Ill. 442; see *Belt v. People*, 97 Ill. 461; *R. R. Co. v. Prickett*, 52 Ill. App. 222.

⁴ *Rigg v. Cook*, 4 Gilm. 336; *John-*

son v. Howe, 2 Gilm. 342; *Martin v. Morelock*, 32 Ill. 485; *R. R. Co. v. Faitz*, 19 Bradw. 85; see *Drda v. Schmidt*, 47 Ill. App. 267.

⁵ *Rigg v. Cook*, 4 Gilm. 336; see *Wilcoxon v. Roby*, 3 Gilm. 475.

CHAPTER XXVI.

ARREST OF JUDGMENT.

When there is some intrinsic defect apparent on the face of the record which would render a judgment in the cause erroneous, the court will, on motion, arrest the judgment.¹ The objection must, however, be one of substance. All formal objections are cured by the statute of amendments and jeofails. Formerly, judgments were constantly arrested for matters of mere form, but this abuse has long since been remedied.²

The general common law rule is, that when a declaration is so defective that it will not sustain a judgment, the objection may be availed of on motion in arrest in the trial court, or on error or appeal.³

After the overruling of a demurrer to the declaration, a motion in arrest of judgment, for a defect in the declaration, ought not to be entertained.⁴ It is otherwise on a default, in which case judgment may be arrested for any substantial defect in the declaration.⁵

A defendant can not have an arrest of judgment for any-

¹ And. Steph. Pl. 185; *Collins v. Robinson*, 2 Scam. 509; *Haynes v. Lucas*, 50 Ill. 436; see *Cooke v. Orne*, 37 Ill. 186; *Jones v. People*, 53 Ill. 366; *Culver v. Bank*, 64 Ill. 528; *Com. Ins. Co. v. Bank*, 61 Ill. 482; *McGill v. Rothger*, 45 Ill. App. 511.

² See And. Steph. Pl. 185; *Nelson v. Borchenius*, 52 Ill. 236; *Shepherd v. Field*, 70 Ill. 438; *Stone Co. v. Whalen*, 151 Ill. 472.

³ *R. R. Co. v. Hines*, 132 Ill. 161; *Wilson v. Mayrick*, 26 Ill. 35; *Schofield v. Settley*, 31 Ill. 515; *Haynes v. Lucas*, 50 Ill. 436; *Kipp v. Lichtenstein*, 79 Ill. 358; *Culver v. Bank*, 64

Ill. 528; *Bowman v. People*, 114 Ill. 474.

⁴ *Rouse v. Peoria*, 2 Gilm. 99; *Edwards v. Blunt*, 1 Stra. 425; *Creswell v. Packham*, 6 Taunt. 630; *Creswell v. Packham*, 2 Marsh. 326; *Coal Co. v. Hood*, 77 Ill. 68; *R. R. Co. v. Hines*, 132 Ill. 161; *Coal Co. v. Glass*, 34 Ill. App. 364; *Shreffler v. Nadelhoffer*, 133 Ill. 536; *R. R. Co. v. Sampson*, 31 Ill. App. 513; *Mut. Aid v. Paine*, 122 Ill. 625.

⁵ *Wright v. Bennett*, 3 Scam. 258; *Edwards v. Blunt*, 1 Stra. 425; *Jenkins v. President*, 1 Cain 86; *Bragg v. City*, 73 Ill. 152.

thing he might have pleaded in abatement;¹ as for instance, an irregularity in the service of a writ, or the want of an indorser of the writ,² or because the writ bears *teste* of a justice who is a party to the suit.³

According to the strict rules of practice a motion in arrest of judgment is a waiver of a motion for a new trial. A party who has made both motions, and calls up his motion in arrest, and has it disposed of, and then allows judgment to be rendered, without directing the attention of the court to his motion for a new trial, will be held to have waived the latter.⁴

Before verdict the intendments are against the pleader, and upon demurrer to a declaration nothing will suffice, by way of inference or implication, in his favor. But on motion in arrest of judgment the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial; and if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration may fairly be presumed to have been proved, the judgment will not be arrested.⁵

Where unnecessary allegations are made in a declaration, which are irrelevant, they will be rejected as surplusage. After a general verdict, judgment will not be arrested because of such faulty allegations.⁶

Where there are several counts in a declaration, and some of them are bad, upon a general verdict, judgment will be arrested.⁷ The verdict, however, may be amended by the judge's notes, so as to apply to the good count; and it is not too late, on the motion in arrest of judgment, for the plaintiff to move for such amendment.⁸ In Illinois it is provided by statute,

¹ 2 Tidd's Pr. 819.

² *Gilbert v. Bank*, 5 Mass. 97; *Colby v. Dillingham*, 7 Mass. 475; *Gage v. Graffam*, 11 Mass. 181.

³ *Prescott v. Tufts*, 7 Mass. 209.

⁴ *Hall v. Nees*, 27 Ill. 411.

⁵ *Penna. Co. v. Ellett*, 132 Ill. 654.

⁶ *Burnap v. Wright*, 14 Ill. 301; see *Tucker v. Randall*, 2 Mass. 283; *Steele v. President*, 2 Johns. 283; *Compton v. People*, 86 Ill. 176; 1 Chit. Pl. 209-211.

⁷ *Benson v. Swift*, 2 Mass. 50; *Austin v. Walsh*, 2 Mass. 406; *Barnard v. Whiting*, 7 Mass. 358; *Sullivan v. Holker*, 15 Mass. 374; *White v. Snell*, 9 Pick. 456; *Maxfield v. Johnston*, 2 Ohio 204; see *Bardill v. Trustees*, 4 Bradw. 94.

⁸ *Norris v. Dunham*, 9 Cow. 151; *Livingston v. Tremper*, 11 Johns. 100; *Stafford v. Green*, 1 Johns. 506.

that "whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict;"¹ and it is held that when there is a good count in the declaration to support the judgment, a motion in arrest can not prevail.²

In an action of replevin, where several pleas are pleaded, laying the property in different persons, a general verdict for the defendant, on all the pleas, is bad, and judgment will be arrested.³ If an action, local in its nature, is brought in a wrong county,⁴ or if case is brought when the action should be trespass,⁵ judgment may be arrested. If there is a misjoinder of counts, the declaration will be bad on a motion in arrest; but if a count is stricken out by leave of the court, it will be considered as if never inserted.⁶

The statute of Illinois provides that "when judgment shall be arrested for any defect in the record of proceedings after the first process, the plaintiff shall not be compelled to commence his action anew; but the court shall order new pleadings to commence with the error that caused the arrest."⁷ Where damages are assessed upon a count in which entire damages are claimed from both actionable and non-actionable causes joined, judgment should be arrested.⁸

Judgment will not be arrested on motion of the plaintiff, on the ground that certain special pleas present immaterial issues if the general issue has also been filed, and the finding of the jury is general, in favor of the defendant.⁹

¹ 2 Starr & Curtis 1822; Rev. Stat. (1893) 1078; Rev. Stat. (1895) 1162; *Bond v. Dustin*, 112 U. S. 604; *Snyder v. Gaither*, 3 Scam. 91; *Ry. Co. v. Doherty*, 53 Ill. App. 282; *Shreffler v. Nadelhoffer*, 133 Ill. 536.

² *Bradshaw v. Hubbard*, 1 Gilm. 390; *North v. Kizer*, 72 Ill. 172; *Shreffler v. Nadelhoffer*, 133 Ill. 536; *Stone v. Whalen*, 51 Ill. App. 512; *Gebbie v. Mooney*, 121 Ill. 255.

³ *Hewson v. Saffin*, 7 Ohio, 232.

⁴ *Robinson v. Mead*, 7 Mass. 353.

⁵ *Case v. Mark*, 2 Ohio 169.

⁶ *Prescott v. Tufts*, 4 Mass. 146; see 1 Chit. Pl. 187-188; *Bardill v. Trustees*, 4 Bradw. 94.

⁷ 2 Starr & Curtis, 1822; Rev. Stat. (1893) 1079; Rev. Stat. (1895) 1163.

⁸ *Chittick v. Town*, 43 Ill. App. 632.

⁹ *Biederman v. O'Connor*, 117 Ill. 493; *Rothschild v. Bruscke*, 132 Ill. 265.

Time and manner of moving in arrest.—A motion in arrest of judgment is made after verdict, or default, and before judgment rendered.¹ The motion should be in writing, and the statute of Illinois provides that the party moving “shall before final judgment be entered, or during the term it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion.”²

See New Trials, page 785 *post*.

¹ *Raney v. McRae*, 14 Ga. 589; (Conn.) 473; *Artarpe v. Broker*, 74 Ga. 462; *Bayard v. Malcolm*, 1 Johns. 310.
Craig v. Craig, 6 J. J. Marsh. (Ky.) 171; *Hansher v. Hansher*, 94 Ind. 208; *Keller v. Stevens*, 66 Ind. 132;
see *Shelley v. Woodbridge*, 2 Root 1893) 1078; Rev. Stat. (1895) 1162.

² 2 Starr & Curtis, 1818; Rev. Stat.

CHAPTER XXVII.

BILLS OF EXCEPTIONS.

When in the course of the trial of a cause, the judge, either in deciding an interlocutory question, or in his charge to the jury, mistakes the law, or is supposed to have mistaken the law, the counsel against whom the decision is made may tender an exception to the opinion of the court, and require the judge to sign and seal a bill of exception.¹

In Illinois, it is provided by the Practice Act, that "if, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow the said exception, and sign and seal the same; and the said exception shall thereupon become a part of the record of such cause."² Under this provision, it is said a bill of exceptions is not to be considered as a writing of the judge, but as a pleading of the party alleging the exceptions, and is to be construed most strongly against him.³

The same act also provides that "exceptions taken to decisions of the court, overruling motions in arrest of judgment, motions for new trials, motions to amend, and for continuances of causes, shall be allowed; and the party excepting

¹See 3 Bl. Com. 372; *Jackson v. Caldwell*, 1 Cow. 622; *Douglass v. McAllister*, 3 Cranch 298; *Vasse v. Smith*, 6 Cranch 256; *Zimmermann v. Cowan*, 107 Ill. 631.

²2 Starr & Curtis, 1822; Rev. Stat. (1893) 1079; Rev. Stat. (1895) 1163; *Stack v. People*, 80 Ill. 32; *Bill v. Mumford*, 80 Ill. 82; *Arms v. Aufield*, 79 Ill. 257; *Davis v. Bradley*, 79 Ill.

316; *Hermann v. Pardridge*, 79 Ill. 471; *Gardner v. Russell*, 78 Ill. 292; *Wickencamp v. Wickencamp*, 77 Ill. 92; *Vanscoyoc v. Kimler*, 77 Ill. 151; *McEliwee v. People*, 77 Ill. 493; *Coggshall v. Beesley*, 76 Ill. 445; *Culliner v. Nash*, 76 Ill. 515.

³*Rogers v. Hall*, 3 Scam. 5; see *James v. Dexter*, 113 Ill. 654; *Graham v. People*, 115 Ill. 566.

may assign for error any decision so excepted to.”¹ Exceptions to the *granting* of such motions are not allowed.²

Where a cause is tried by the court, without a jury, the same statute provides that exceptions may be taken to the decisions of the court, and the party excepting may assign for error any decision so excepted to, “whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and evidence.”³

Where the bill of exceptions fails to set out the findings and judgment of the court on a trial without a jury, and to show they were properly excepted to, no questions arising upon such findings and judgment can be considered by the appellate court;⁴ and where no propositions of law are submitted, it will be assumed that the court ruled the law correctly.⁵

It is also provided by the same statute, that “exceptions taken to decisions of any court in this state, overruling motions in arrest of judgment, for new trials, or for continuances, or change of venue, shall be allowed in criminal cases, and in penal and *qui tam* actions; and the party excepting to such decisions may assign the same for error, in the same manner as in civil cases.”⁶

In regard to applications for changes of venue, in Illinois, the court has, by another statute, a discretion to grant or refuse such applications in criminal causes, where the offense is not punishable with death;⁷ but in civil causes it is otherwise, and a refusal to grant such an application may be assigned for error.⁸

¹ *McKenzie v. Penfield*, 87 Ill. 38; *Grundies v. Martin*, 90 Ill. 552; *Stern v. People*, 96 Ill. 475.

² *Brookbank v. Smith*, 2 Scam. 78; *Brooks v. McKinney*, 4 Scam. 309; *Martin v. Chambers*, 84 Ill. 579.

³ 2 Starr & Curtis 1826; Rev. Stat. (1893) 1079; Rev. Stat. (1895) 1163; *Farwell v. Shove*, 105 Ill. 61; *R. R. Co. v. Lake View*, 105 Ill. 207; *People v. McCoy*, 132 Ill. 138; *Gould v. Howe*, 127 Ill. 252.

⁴ *Gould v. Howe*, 127 Ill. 252; *Bank*

v. LeMoine, 127 Ill. 253; *Dinsmore v. Woodburn*, 56 Ill. App. 225.

⁵ *Bank v. LeMoine*, 127 Ill. 253; *People v. McCoy*, 132 Ill. 138.

⁶ 2 Starr & Curtis 2456; Rev. Stat. (1893) 1079; Rev. Stat. (1895) 1163; *French v. People*, 77 Ill. 531; *Stack v. People*, 80 Ill. 32.

⁷ 2 Starr & Curtis 2456; Rev. Stat. (1893) 1471; Rev. Stat. (1895) 1573.

⁸ *Walsh v. Ray*, 38 Ill. 30; *Enslinger v. People*, 47 Ill. 384.

When exceptions must be taken—Signing and sealing of bill, etc.—A party, to avail himself of an exception to a decision of the court, must except at the time the decision is made, and the bill must affirmatively show that the exception was taken at that time;¹ or if the exception is to the charge of the court, it must be taken before the verdict is rendered.² In practice, however, the exception is merely noted at the time, and the bill is afterwards settled.³

Where a bill of exceptions was filed two days after judgment, and at the conclusion stated, "to all which opinions of the court the plaintiff excepts," it was held not to be sufficient.⁴

The appellate court will not presume that an exception was taken at the proper time, merely because the judge who tried the cause has signed a bill of exceptions, when the bill does not show upon its face that the exception was taken at the time of the decision.⁵

A bill of exceptions should be reduced to form, and signed, during the term in which the cause is tried, except in cases where the counsel consent, or the court, by an entry on the record, directs, that it may be prepared in vacation, and signed *nunc pro tunc*; and where counsel consent that it may be settled out of term, the better practice is to file a written stipulation, or cause an entry to be made on the record, to that effect.⁶

¹ *Dickhut v. Durrell*, 11 Ill. 72; *Buckmaster v. Cool*, 12 Ill. 74; *Burkett v. Bond*, 12 Ill. 87; *Sullivan v. Dollins*, 13 Ill. 85; *Martin v. People*, 13 Ill. 341; *Dufield v. Cross*, 13 Ill. 699; *Swafford v. Dovenor*, 1 Scam. 165; *Gilmore v. Ballard*, 1 Scam. 252; *Leigh v. Hodges*, 3 Scam. 15; *Meire v. Brush*, 3 Scam. 21; *Gibbons v. Johnson*, 3 Scam. 61; *Evans v. Fisher*, 5 Gilm. 453; *Metcalf v. Edmiston*, 25 Ill. 392; *Charlesworth v. Williams*, 16 Ill. 338; *Hance v. Miller*, 21 Ill. 636; *Trustees v. Misenheimer*, 89 Ill. 151; *Drury v. Dungan*, 2 Bradw. 15; *R. R. Co. v. Rhodes*, 76 Ill. 285; *Harbaugh v. City*, 74 Ill. 367; *Caveny v. Weiller*, 90 Ill. 158.

² *Hughes v. Robertson*, 1 Mon. (Ky.) 215; *Bratton v. Mitchell*, 5 Watts 69; *Hill v. Ward*, 2 Gilm. 285; see *R. R. Co. v. Garish*, 39 Ill. 370; *McPherson v. Hall*, 44 Ill. 264; *R. R. Co. v. Hodglin*, 85 Ill. 481.

³ *Morris v. Buckley*, 8 S. & R. 216; *Stewart v. Bank*, 11 S. & R. 270; *R. R. Co. v. Palmer*, 24 Ill. 43; *Leigh v. Hodges*, 3 Scam. 17.

⁴ *Gibbons v. Johnson*, 3 Scam. 61; see *Dickhut v. Durrell*, 11 Ill. 72.

⁵ *Dickhut v. Durrell*, 11 Ill. 72; see *Miller v. Glass*, 118 Ill. 443.

⁶ *Evans v. Fisher*, 5 Gilm. 453; *Burst v. Wayne*, 13 Ill. 664; see *Satonstall v. Comm.*, 13 Ill. 705; *Dent v. Davidson*, 52 Ill. 109; *French v. Edwards*, 13 Wall. 506; *R. R. Co.*

The court may permit the bill to be filed at the next term, but the practice is not commended.¹

The time for filing a bill of exceptions can be extended by the judge only in term time, when sitting as a court,² and before the time originally limited has expired.³

When a party has presented his bill of exceptions to the judge within the time prescribed for the filing thereof, he has complied with the rule so far as it is in his power to do so, and is not to be prejudiced because the judge may not actually sign the bill until after the time so fixed has expired,⁴ and the presumption is, where the judge has signed the bill, that he would not have done so unless it had been presented in due time. The mere fact that the bill was not *filed* within the prescribed time, does not rebut that presumption; though it may be rebutted by proof.⁵

An amended bill of exceptions, filed in the appellate court without suggesting a diminution of the record, or obtaining leave to file a supplemental record, and after the filing of the record itself, will not be considered in determining the cause.⁶

A seal is essential to the validity of a bill of exceptions.⁷ It must be signed and sealed by the judge who tried the cause;⁸ and if he has inadvertently omitted to seal it, he may, on motion, be permitted to do so, although his term of office has ex-

v. *People*, 106 Ill. 652; see *Morris v. Watson*, 61 Ill. App. 536.

¹ *Buckmaster v. Beames*, 4 Gilm. 443; *Mrownfield v. Brownfield*, 58 Ill. 152; see *Stein v. Kendall*, 1 Bradw. 101; *Goodrich v. Cook*, 81 Ill. 41.

² *Hake v. Strubb*, 121 Ill. 322.

³ *Hawes v. People*, 129 Ill. 123; see *Ins. Co. v. Shattuck*, 159 Ill. 610.

⁴ *Hawes v. People*, 129 Ill. 123; *Hoke v. Struble*, 121 Ill. 322; *R. R. Co. v. Morrison*, 160 Ill. 288.

⁵ *Ferris v. McClure*, 40 Ill. 98.

⁶ *Elliot v. Levings*, 54 Ill. 213; see *Goodrich v. City*, 62 Ill. 121; *Myers v. Phillips*, 68 Ill. 269; *Smith v. Newland*, 40 Ill. 100.

⁷ *Miller v. Jenkins*, 44 Ill. 443; *Gale v. Rector*, 10 Bradw. 262; *Association v. Powers*, 30 Ill. App. 82; *R. R. Co. v. DeMarks*, 51 Ill. App. 581; *City v. Grove*, 56 Ill. App. 371; *French v. Hotchkiss*, 60 Ill. App. 580.

⁸ *R. R. Co. v. Peterson*, 15 Bradw. 149; *City v. Johnson*, 12 Bradw. 255; *Thompson v. Duff*, 17 Bradw. 304; *Reeves v. Reeves*, 54 Ill. 332; *David v. Bradley*, 79 Ill. 316; *Lumber Co. v. City of Chicago*, 56 Ill. 304; *R. R. Co. v. Town of Marseilles*, 107 Ill. 313; *R. R. Co. v. Riley*, 26 Ill. App. 171; *R. R. Co. v. Benham*, 25 Ill. App. 248; *Alley v. McCabe*, 46 Ill. App. 368.

pired;¹ and if a judge refuses to sign a bill of exceptions, properly presented, a *mandamus* will be awarded to compel him to sign it.²

In a case in Illinois, where a judge refused to sign a bill of exceptions, and disobeyed a *mandamus* from the supreme court, requiring him to sign it, and then resigned his office, it was held that he could not be compelled to sign the bill, being no longer in office; but he was attached and fined for the contempt.³ And it being understood that the parties admitted the truth of the bill, the court, on motion of the appellant, ordered that it should be taken and considered as a part of the record.⁴ In another case, where the counsel for a prisoner was arrested during the trial, and the prisoner was thereby prevented from tendering a bill of exceptions, the supreme court held that it could not grant him any relief in the matter.⁵

As to the effect of the death of trial judge before bill of exceptions is signed by him, see the cases of *Allen v. McCabe*, 147 Ill. 410, and *People v. McConnell*, 155 Ill. 192. When the recitals of the record made up by the clerk of the court, and the bill of exceptions disagree, the latter will prevail.⁶

When a bill of exceptions is signed and sealed by the judge, both parties are concluded by it.⁷

What the bill should contain, and when necessary, etc.—A party excepting should show by his bill all those matters of which he intends to avail himself in the appellate court, and which would not otherwise appear in the record of the cause; the function or office of a bill of exceptions being to incorporate into the record and preserve exceptions to the rulings of the court upon motions, questions of evidence and other

¹ *Frazier v. Laughlin*, 1 Gilm. 185; see *Gibson v. Bailey*, 9 N. H. 169; *City v. Johnson*, 12 Bradw. 255; *Duchardt v. People*, 12 Bradw. 299.

² 3 Black. Com. 372; *People v. Pearson*, 2 Scam. 189; *People v. Williams*, 91 Ill. 87; *R. R. Co. v. Gilchrist*, 9 Bradw. 135; *People v. Prendergast*, 117 Ill. 588; *People v.*

Anthony, 129 Ill. 218; *Hawes v. People*, 129 Ill. 123.

³ *People v. Pearson*, 3 Scam. 270.

⁴ *Bristol v. Phillips*, 3 Scam. 287; see *R. R. Co. v. Gilchrist*, 9 Bradw. 135.

⁵ *O'Hara v. People*, 40 Ill. 533.

⁶ *Hirth v. Lyneh*, 62 Ill. App. 111.

⁷ *Bingham v. Cabbott*, 3 Dall. 38; Bull N. P. 316.

matters which otherwise would be no part of it, and therefore could not be considered on writ of error or appeal.¹

Where an exception is taken to permitting a question to be asked, and the witness to answer it, the answer as well as the question should be given in the bill of exceptions;² and a party complaining of the refusal to admit evidence, should show by his bill of exceptions what the evidence was which was offered and refused.³

An affidavit in support of a petition for a change of venue,⁴ or of any kind;⁵ or the reasons in writing filed on moving for a new trial;⁶ or a sworn answer of parties to an attachment for a contempt;⁷ or a copy of an instrument indorsed on a declaration;⁸ or a bill of particulars;⁹ or exhibits or instruments or documents offered,¹⁰ can only be made a part of the record by a bill of exceptions, and unless so presented will not be consid-

¹ *Vanlandingham v. Fellows*, 1 Scam. 233; *Miller v. Houcke*, 1 Scam. 501; *McLaughlin v. Walsh*, 3 Scam. 185; *Bristol v. Phillips*, 3 Scam. 287; *Saunders v. McCollins*, 4 Scam. 419; *McKee v. Ingalls*, 4 Scam. 30; *Cummings v. McKinney*, 4 Scam. 58; *Hatch v. Potter*, 2 Gilm. 725; *Corey v. Russell*, 3 Gilm. 366; *Petty v. Scott*, 5 Gilm. 209; *Holmes v. People*, 5 Gilm. 478; *Mann v. Russell*, 11 Ill. 586; *Gallimore v. Dazey*, 12 Ill. 143; *McBain v. Enloe*, 13 Ill. 76; *Randolph v. Emerick*, 13 Ill. 344; *Moss v. Thompson*, 13 Ill. 570; *Edwards v. Vandermack*, 13 Ill. 633; *McCormick v. Gray*, 16 Ill. 138; *Kirbey v. Watt*, 19 Ill. 393; *R. Co. v. Jones*, 20 Ill. 221; *Schlump v. Reidersdorf*, 28 Ill. 68; *Ballance v. Leonard*, 37 Ill. 43; *Nichols v. People*, 40 Ill. 395; *Douglas v. Parker*, 43 Ill. 146; *Ins. Co. v. Vanduzor*, 49 Ill. 489; *Flaherty v. McCormick*, 123 Ill. 525; *Hake v. Strubel*, 121 Ill. 321.

² *Miller v. Houcke*, 1 Scam. 501; *Russell v. Martin*, 2 Scam. 492; *Hay*

v. Smith, 3 Scam. 427; see *Warner v. Manski*, 17 Ill. 234.

³ *Kirby v. Watt*, 19 Ill. 393.

⁴ *Schlump v. Reidersdorf*, 28 Ill. 68; *McElwee v. People*, 77 Ill. 493; *Bedee v. People*, 73 Ill. 320; *Pick v. Ketchum*, 73 Ill. 366; *R. R. Co. v. Melville*, 66 Ill. 329.

⁵ See *Lucas v. Farrington*, 21 Ill. 31; *Schuh v. D'Oenck*, 51 Ill. 85; *Cunningham v. Craig*, 53 Ill. 252; *Jones v. People*, 53 Ill. 366; *Vansocoyoc v. Kimler*, 77 Ill. 151; *Thompson v. White*, 64 Ill. 314; *Gaddy v. McCleave*, 59 Ill. 182; *Buettner v. Mfg. Co.*, 90 Ill. 415; *R. R. Co. v. Bowman*, 122 Ill. 598; *Pardridge v. Morgenthau*, 157 Ill. 395.

⁶ See *Boyle v. Levings*, 28 Ill. 314; *Trustees v. Misenheimer*, 89 Ill. 151; *McCord v. Bank*, 84 Ill. 49; *Engel v. Sellers*, 51 Ill. App. 577.

⁷ *Comm. v. People*, 31 Ill. 97.

⁸ *Smith v. Wilson*, 26 Ill. 186; see *Martin v. Ehrenfeld*, 24 Ill. 187.

⁹ *Eggleston v. Buck*, 24 Ill. 262; *Schofield v. Settle*, 31 Ill. 515.

¹⁰ *Legnard v. Rhodes*, 51 Ill. App.

ered by the appellate court. A party can not question, on error, a ruling of the court below in refusing to require the plaintiff to file a more definite bill of particulars, unless that already filed is preserved in the record by a bill of exceptions.¹ And when a party excepts to the denying of a motion (on which counter testimony may be heard), and shows in his bill of exceptions an affidavit in support of the motion, he should also show that such affidavit was the only evidence heard on the question.² And it is said that the "mere entry of a motion does not make the motion or reasons therefor a part of the record, but that must be done by bill of exceptions."³

The proper practice, where a party objects to an order upon a petition for the removal of a cause from a state to a federal court, is to preserve in a bill of exceptions the evidence upon which the order was made; and the record will then show whether or not such order was erroneous.⁴

To enable the appellate court to pass upon the propriety of modified instructions, the instructions as asked should be before that court, and also the modifications as made by the court below.⁵ Errors assigned on the refusal of instructions will not be considered, unless those instructions which were given are preserved in the record.⁶

In the case of an exception to the admissibility of testimony the particular testimony objected to, and, it seems, the ground of the objection, should appear by the bill of exceptions.⁷ And where the bill of exceptions does not purport to contain all the evidence, the presumption is in favor of the verdict.⁸

477; *Page v. Brew. Co.*, 54 Ill. App. 157; *Leavitt v. Kennicott*, 54 Ill. App. 634; *Hennesy v. Metzger*, 50 Ill. App. 533; *Cheney v. Beaty*, 56 Ill. App. 90; *Reeve v. Peppard*, 57 Ill. App. 556.

¹ *Schofield v. Settley*, 31 Ill. 515; see *Neely v. Wright*, 72 Ill. 292.

² *Miller v. Metzger*, 16 Ill. 390.

³ *Daniels v. Shields*, 38 Ill. 197; *Gill v. People*, 42 Ill. 321.

⁴ *R. R. Co. v. People*, 106 Ill. 652; *Ins. Co. v. Vanduzor*, 49 Ill. 489; *Trans. Co. v. Joesting*, 89 Ill. 152; *Cromie v. Van Northwick*, 56 Ill. 353; *Ins. Co. v. Heck*, 65 Ill. 111.

⁵ *Boise v. Henney*, 32 Ill. 130; *Balance v. Leonard*, 37 Ill. 43; *Gulliver v. Ex. Co.*, 38 Ill. 503; *Prinderiville v. People*, 42 Ill. 217; *Gill v. Skilton*, 54 Ill. 158; *Krug v. Ward*, 77 Ill. 603.

⁶ *Gill v. Skelton*, 54 Ill. 158; *Cox v. People*, 109 Ill. 457; *Ry. Co. v. Yando*, 127 Ill. 215.

⁷ *Myers v. People*, 26 Ill. 173; *Johnson v. R. R. Co.*, 111 Ill. 413.

⁸ *Elizabethtown v. Lefler*, 23 Ill. 96; *Buckland v. Goddard*, 36 Ill. 206; *Balance v. Leonard*, 37 Ill. 43; *R. R. Co. v. McIntire*, 39 Ill. 298; *R. R.*

If documents introduced are lengthy, and relate partly to other matters, it seems the material parts only need be preserved in the record.¹

A bill of exceptions is not necessary in any case where the error is intrinsic, appearing on the face of the record.² An exception to the overruling of a demurrer,³ or a motion in arrest of judgment,⁴ is improper, as these matters are part of the record, and need no bill of exceptions to make them so. If a bill of exceptions includes the pleadings in the cause, or other unnecessary matters, the costs thereby occasioned will be taxed against the party who caused their insertion.⁵

Interrogatories to and answers of a garnishee,⁶ or a submission and award filed for the purpose of obtaining judgment,⁷ are part of the record, and need not be put into a bill of exceptions. Objections to remarks of counsel not contained in the bill of exceptions will not be considered on appeal.⁸

Where a judgment is confessed in *term*, on a promissory note and warrant of attorney, these papers can become part of the record only by being preserved in a bill of exceptions;⁹ but it is otherwise in the case of a judgment confessed in vacation.¹⁰

Original papers, even by consent, can not be presented in the appellate court as a part of a bill of exceptions, unless some-

Co. v. Garish, 39 Ill. 370; *Miner v. Phillips*, 42 Ill. 123; *McPherson v. Nelson*, 44 Ill. 124; *Gallagher v. Brandt*, 52 Ill. 80; *Esty v. Grant*, 55 Ill. 341; *Trustees v. Misenheimer*, 89 Ill. 151; *Lawyer v. Langhans*, 85 Ill. 138; *Culliner v. Nash*, 76 Ill. 515; *Prout v. Grout*, 72 Ill. 456; *Henry v. Holloway*, 78 Ill. 356; *Lee v. Town*, 118 Ill. 304; *Johnson v. Glover*, 19 Bradw. 585; *Brown v. Coal Co.*, 40 Ill. App. 602; *Redner v. Davern*, 41 Ill. App. 247; *Garrity v. Hamburger*, 136 Ill. 499; *Goodwillie v. Lake*, 137 Ill. 67; *Auburn v. Goodwin*, 128 Ill. 65.

¹ *Trustees v. Welchley*, 19 Ill. 64.

² *Kitchell v. Burgwin*, 21 Ill. 40;

Swift v. Castle, 23 Ill. 209; *Schmidt v. Skelly*, 10 Bradw. 564.

³ *Hawk v. McCullough*, 21 Ill. 220; *Hamlin v. Reynolds*, 22 Ill. 207; *Mix v. Nettleton*, 29 Ill. 245; *Chase v. De Wolf*, 69 Ill. 47; *Offield v. Siler*, 15 Bradw. 308.

⁴ *Mix v. Nettleton*, 29 Ill. 245; *Nichols v. People*, 40 Ill. 395.

⁵ *R. R. Co. v. Jones*, 20 Ill. 221; *Vandusen v. Pomeroy*, 24 Ill. 289.

⁶ *Rankin v. Simonds*, 27 Ill. 352.

⁷ *Buntain v. Curtiss*, 27 Ill. 374.

⁸ *People v. Board*, 26 Ill. App. 476; *Hickam v. People*, 137 Ill. 80; *Gannon v. People*, 127 Ill. 518.

⁹ *Waterman v. Caton*, 55 Ill. 94.

¹⁰ *Durham v. Brown*, 24 Ill. 94; *Waterman v. Caton*, 55 Ill. 94.

thing is to be determined by an inspection of them, or they can not be exhibited by copy so as to present the point of law intended to be raised—and then they should be clearly identified by the bill of exceptions.¹

A bill of exceptions presenting a mere abstract proposition, as applicable to one case as to another, can not be made the foundation of a writ of error. The party excepting must distinctly point out wherein he supposes himself to be aggrieved.²

Although a bill of exceptions may show that testimony was improperly admitted or excluded, or instructions were improperly given or refused, or other error was committed by the court, yet unless it also appears from the bill that the proper objections were made and exceptions taken, such matters can not be assigned for error.³

The counsel for the party excepting prepares the bill of exceptions, and submits it to the judge, who examines it, and, if correct, signs and seals it; and it is then filed, and becomes a part of the record.

Documentary evidence is sufficiently made a part of the record by recitals in the bill of exceptions that it was marked by certain numbers and attached thereto and made a part thereof, and by attaching the same to such bill designated by such numbers, before the bill is signed and sealed by the judge.⁴

It is impossible to give forms of bills of exceptions appli-

¹ *Trustees v. Welchley*, 19 Ill. 64.

² *King v. Kenny*, 4 Ohio 79; *McDougal v. Fleming*, 4 Ohio 388; *Lewis v. Bank*, 12 Ohio 132; see *Myers v. People*, 26 Ill. 173.

³ *Snyder v. Laframboise*, Breese 343; *Peck v. Boggess*, 1 Scam. 281; *Miller v. Dobson*, 1 Gilm. 572; *Schlenker v. Risley*, 3 Scam. 483; *Selby v. Hutchinson*, 4 Gilm. 319; *Buckmaster v. Cool*, 12 Ill. 74; *Burkett v. Bond*, 12 Ill. 87; *Martin v. People*, 13 Ill. 341; *Pottle v. McWorter*, 13 Ill. 454; *Smith v. Kahill*, 17 Ill. 67; *Sedgwick v. Phillips*, 22 Ill. 183; *Mathews v. Hamilton*, 23 Ill.

470; *Boyle v. Levings*, 28 Ill. 314; *R. Co. v. Garish*, 39 Ill. 370; *R. Co. v. McKean*, 40 Ill. 220; *McClurkin v. Ewing*, 42 Ill. 283; *Gardner v. Haynie*, 42 Ill. 291; *Gill v. People*, 42 Ill. 321; *McPherson v. Hall*, 44 Ill. 264; *Boynton v. Renwick*, 46 Ill. 280; *Nathan v. City*, 46 Ill. 347; *Johnson v. Gillett*, 52 Ill. 358; *Min-gia v. People*, 54 Ill. 274; *People v. Green*, 54 Ill. 280; *R. Co. v. Miller*, 55 Ill. 448; *Wright v. Wheeler*, 55 Ill. 528.

⁴ *Legnard v. Rhoades*, 156 Ill. 431; *Moses v. Loomis*, 156 Ill. 392.

cable to all cases. The following may be used, varying them to suit the circumstances.

No. 365. *Bill of exceptions to evidence, instructions, and denying of motion for new trial.*

In the ——— Court.

—— Term, 18—.

C. D. }
ats. } *Assumpsit.*

A. B. } Be it remembered, that on the trial of this cause, in this term, the plaintiff gave in evidence on his behalf as follows, that is to say:

J. K., being duly sworn, testified: My name is J. K.; I am acquainted with, etc. (*Objections made and exceptions taken in the course of the examination may be set forth in this manner:*) Thereupon the counsel for the plaintiff asked the witness this question: What, etc. To which question the defendant, by his counsel, then and there objected, for the reason, etc.; but the court overruled the objection, and permitted the witness to answer the question, which he thereupon did as follows: I heard, etc. To which ruling and decision of the court, in permitting this question to be so asked and answered, the defendant, by his counsel, then and there excepted. (*Proceed with the testimony thus:*) And thereupon the witness further testified: I acted for the plaintiff, etc.

On cross-examination by the counsel for the defendant, this witness testified: I was not present, etc.

(*Proceed in like manner with the testimony of any other witnesses for the plaintiff.*)

And thereupon the defendant gave in evidence on his behalf as follows, that is to say:

(*Here insert the testimony for the defendant, with any objections made and exceptions taken by him.*)

The foregoing was all the evidence introduced on the trial of this cause.

And thereupon the court gave to the jury, on behalf of the plaintiff, the following instructions, to wit:

(*Here insert the instructions for the plaintiff.*)

To the giving of each and all of which instructions the defendant, by his counsel, then and there excepted.

And thereupon the court gave to the jury, on behalf of the defendant, the following instructions, to wit:

(*Here insert the instructions given for the defendant.*)

And the defendant, by his counsel, then and there asked the court to also give to the jury the following instructions, to wit:

(*Here insert the refused instructions.*)

But the court refused to give these instructions to the jury; to which decision of the court in refusing to give the same, and each of them, to the jury, the defendant, by his counsel, then and there excepted.

And thereupon the jury rendered a verdict against the defendant; whereupon the defendant, by his counsel, then and there moved the court to set

aside the verdict so rendered, and grant a new trial of this cause, and filed the following reasons in writing for his motion, to wit:

(*Here insert the reasons filed.*)

But the court denied the motion, and gave judgment on the verdict against the defendant; to which decision of the court, in denying such motion, the defendant, by his counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made; which is done accordingly, this — day of, etc.

L. M., Judge. [L. s.]

No. 366. Bill of exception on the refusal of a continuance.

(*Title of court, etc.*) Be it remembered, that on this — day of, etc., in this term, the defendant moved the court to continue this cause, on account of, etc., and read and filed in support of his said motion the following affidavit, to wit:

(*Here insert the affidavit.*)

But the court, having heard the said affidavit, (*) denied the said motion, and refused to continue this cause; to which ruling and decision of the court the defendant, by his counsel, then and there excepted. And because the matters aforesaid do not fully appear of record, the defendant presents this his bill of exception, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute, etc., which is accordingly done.

L. M., Judge. [L. s.]

In the case of a motion on which counter affidavits or testimony may be heard, insert (at the asterisk in the above form) the words, "which was all the evidence heard in that behalf"—first setting forth all the affidavits or testimony introduced.¹

Bills of exception may be amended upon application and notice to the adverse party; but it must be made in term time.²

See several bills of exceptions to instructions of the court, in 1 Scam. R. 47, 107, 181, 187; a bill of exceptions to evidence and the denial of a motion for a new trial, in 18 Ill. R. 392; and a bill of exception on the denial of a motion to set aside a judgment by confession, in 1 Scam. R. 428.

¹ *Miller v. Metzger*, 16 Ill. 390.

² *Goodrich v. Minonk*, 62 Ill. 121;
Myers v. Phillips, 68 Ill. 269; *Smith*
v. Newland, 40 Ill. 100; *Heinsen v.*

Lamb, 117 Ill. 550; *Pecple v. Anthony*, 129 Ill. 218; *Wright v. Griffey*,
146 Ill. 394; *R. R. Co. v. Levy*, 57
Ill. App. 365.

CHAPTER XXVIII.

AGREED CASES—QUESTIONS OF LAW CERTIFIED.

Agreed cases—Certified to supreme or appellate court.—

It is provided by section 74 of the Practice Act that

“The parties in any suit or proceeding at law or in chancery, in any circuit court, or the superior court of Cook county, or in any city court, make an agreed case containing the points of law at issue between them, and file the same in such court; and the said agreed case, with the decision thereon, may be certified to the appellate court or supreme court by the clerk of such court, without certifying any fuller record in the case; and upon such agreed case being so certified and filed in the appellate court or supreme court, the appellant or plaintiff in error may assign errors, and the case shall then be proceeded in in the same manner as it might have been had a full record been certified to said appellate court or supreme court.”¹

When a court has reason to believe that an agreed case is not real, but a fictitious proceeding, proof will be required that the action is not feigned.² The supreme court or appellate court has no jurisdiction to decide an agreed case without it first having been decided by a trial court and a record is certified from that court;³ nor can such courts acquire jurisdiction by stipulation of the parties in the absence of a judgment.⁴

Under an agreed statement of facts, where the clerk certified counsel's certificate and “the final decision of the case,”

¹ 2 Starr & Curtis, 1837; Rev. Stat. (1895), 1165; Rev. Stat. (1893), 1081.

² *People v. Leland*, 40 Ill. 118; *Spraggin v. Houghton*, 2 Scam. 211; *McConnell v. Shields*, 1 Scam. 582. Rule 20 of Sup. Ct. 93 Ill. 7; *Puterbaugh's Ch. Pl. & Pr.* 956.

³ *Plumleigh v. White*, 4 Gilman. 387; see *R. R. Co. v. Guertin*, 115 Ill. 466.

⁴ *Moore v. Bolin*, 5 Bradw. 556; *Village v. Cemetery Ass'n*, 5 Bradw. 230; *Moody v. Peake*, 13 Ill. 343; *Crull v. Keener*, 17 Ill. 246; *Cox v. Jordan*, 86 Ill. 560.

the transcript was held fatally defective for omitting the certificate of the decision of the court on the questions of law stated in the stipulation.¹

Questions of law certified—Judges may certify questions of law.—Section 75 of the Practice Act provides that

“Any judge of the circuit court, or the superior court of Cook county, or of any city court, may, if the parties litigant assent thereto, certify any question or questions of law arising in any case tried and finally determined before him to the appellate or supreme court, together with his decision thereon; or the parties in the case may agree as to the questions or points of law arising in the case, and the same may be certified by the counsel or attorneys of the respective parties, who shall sign their names thereto; and upon such certificate being made, the same shall be filed in the court rendering the decision, and a copy of such certificate, certified by the clerk of said court, with the decision thereon and final decision in the case, to the appellate court or supreme court, and filed therein; and upon filing the same, the like proceedings may be had in the appellate court or supreme court as if a full and complete record had been transcribed and certified to said court.”²

Exceptions to the two above sections.—It is declared by section 76 of the Practice Act, that

“The two preceding sections shall not apply to cases in which the title to real estate is in question, nor to cases where any question of fact appertaining to the constitutional enactments of a law of this state is involved.”³

Certification of.—In plain terms, section 75 of the statute prescribes, first, a certificate by the counsel or attorneys of the “questions or points of law arising,” a copy of which must be certified by the clerk; who must also certify, second, the decision thereon; and third, the final decision. The court is not, under this section, authorized to accept the agreement or certificate

¹ *R. R. Co. v. Goodwin*, 18 Bradw. 65; see *Ives v. Hulce*, 17 Bradw. 38.

² 2 Starr & Curtis 1837; Rev. Stat. (1895), 1165; Rev. Stat. (1893), 1081; see *R. R. Co. v. Guertin*, 115 Ill. 466.

³ 2 Starr & Curtis, 1837; Rev. Stat. (1893), 1081; Rev. Stat. (1895), 1165; see *Wheeler v. Gage*, 28 Ill. App. 427.

of counsel as to the facts, and without them, the court can not know what the decision was, upon the points of law stated.'

No. 367. Agreed case between parties in suit pending.
(Under Sec. 74, Practice Act.)²

In the ——— Circuit Court.

—— Term, A. D. 18—.

A. B. The ——— Railroad Company.	}	<i>vs.</i> <i>Trespass on the case.</i> We, A. B., plaintiff, and the defendant, — rail- road company, in the above entitled cause, now pend- ing and undetermined in said court, in pursuance of the statute in such case provided, do hereby mutually make this an agreed case and hereby stipu- late as follows, that is to say:
--	---	--

That on, etc., the plaintiff filed his declaration in due form, counting upon a failure of the defendant to fence its road, as required by the statute in such case made and provided, that is to say (*here set forth the substance of the allegations of each count*); and that on, etc., the defendant filed its plea of the general issue thereto, to which the plaintiff added a *similiter*.

That the facts of the matter in controversy are as follows: (*Here set forth the facts in the case as agreed upon.*)

It is further stipulated and mutually agreed by and between the said parties, that the points of law at issue between them are as follows, viz.:

I. Is the plaintiff entitled to recover, he having built the fence off the line between him and the defendant's right of way, as above set forth?

II. Is it lawful to award as damages a sum in double the amount of the cost of the fence mentioned?

III. Under the foregoing stipulation and agreement, is the plaintiff entitled to recover against the defendant?

And it is further stipulated and agreed by and between the parties, that upon the foregoing agreed case, containing the points of law at issue between them, and filed in said cause, that the court shall decide thereon, and shall render judgment therein, according as the rights of the said parties in law may appear, in the same manner as if the facts aforesaid were proved upon the trial of said issue; in pursuance of the statute in such case provided.

Dated, this ——— day of ——— A. D. 18—.

A. B. by ———, his attorney.

The ——— Railroad Co. by ———, its attorney.

No. 368. Decision of the court upon agreed case between parties in suit pending.

(Under section 74, Practice Act.)³

(*Venue, and title of cause as in No. 367.*)

And now come the plaintiff and defendant, by their respective attorneys,

¹ *R. R. Co. v. Goodwin*, 18 Brad. 65.

³ See *R. R. Co. v. Goodwin*, 18

² See *R. R. Co. v. Goodwin*, 18 Bradw. 65.
Bradw. 65.

and this cause coming on to be heard before the undersigned, judge of said court, upon the agreed case between said parties, and the points of law at issue between them; and the same having been argued by the attorneys for the parties respectively; and the court being fully advised in the premises, doth decide and hold,

I. That the plaintiff is entitled to recover, he having built the fence off the line between him and the defendant's right of way as in said agreement mentioned.

II. That it is lawful to award as damages, a sum in double the amount of the cost of the fence mentioned.

III. That under the stipulation and agreement by and between the parties, and upon the said agreed facts and the law of the case, as filed in said cause, the plaintiff is entitled to recover against the defendant.

IV. Therefore the court doth decide and hold that the plaintiff is entitled to recover of and from the defendant the sum of — dollars, with costs of suit to be taxed by the clerk, and directs that judgment be entered accordingly, in pursuance of the statute in such case made and provided.

Dated this — day of —, A. D. 18—.

— Judge.

Upon the decision of the court, thus made, a judgment should be entered, whereupon the said agreed case, with the decision thereon, and the judgment rendered, may be certified to the appellate court or the supreme court, by the clerk of such court, without certifying any fuller record in the case.¹

No. 369. Agreement that judge may certify questions of law.

(Under Sec. 75, Practice Act.)

(*Venue, and title of cause as in No. 367, ante*).

We, A. B., plaintiff, and C. D., defendant, in the above entitled cause, tried and finally determined in said court, do hereby consent and agree that the judge of said court may certify any question or questions of law arising in this cause to the appellate (*or supreme*) court, together with his decision thereon, in pursuance of the statute in such case provided; and that upon such certificate being made, the same shall be filed in said court, and that a copy of such certificate, certified by the clerk of said court, with the decision thereon, and the final decision in this cause, may be certified to the appellate court (*or supreme court*), and filed therein; and upon filing the same, the like proceedings may be had in the appellate (*or supreme*) court, as if a full and complete record had been transcribed and certified to said court.

Dated this— day of —, A. D. 18 —.

A. B., Plaintiff.

C. D., Defendant.

¹ See authorities already cited, *ante*.

No. 370. *Agreement to parties as to questions of law arising in the case.*
(Under Sec. 75, Practice Act.)

(*Venue and title of cause as in No. 367, ante.*)

We, A. B., plaintiff, and C. D., defendant, in the above entitled cause, tried and finally determined in said court, do hereby, in pursuance of the statute in such case provided, consent and agree, as to the questions or points of law arising in the cause; and that the same may be certified by our respective counsel or attorneys, who shall sign their names thereto; and that upon such certificate being made, the same shall be filed in said court; and that a copy of such certificate, certified by the clerk of said court, with the decision thereon, and the final decision in the case, may be certified to the appellate court (*or supreme court*), and filed therein; and that upon filing the same, the like proceedings may be had in the appellate court (*or supreme court*), as if a full and complete record had been transcribed and certified to said court.

Dated, etc.

A. B., Plaintiff.

C. D., Defendant.

No. 371. *Certificate of judge of questions of law arising in a case determined, etc.*

(Under Sec. 75, Practice Act.)¹

(*Venue, and title of cause as in No. 367, ante.*)

The undersigned, judge of the, etc., hereby certifies that the above entitled cause was based upon, and originated in a distress for rent, under section 17 of chapter 80 of the revised statutes of 1874, by the plaintiff filing with the clerk of said court a copy of a distress warrant against the defendant, with an inventory of the property levied upon; which was a warrant against the goods of the defendant for rent claimed by the plaintiff to be due and in arrear to him as the landlord of the defendant.

A summons was issued, as provided in section 18 of that act, which was duly served on the defendant, who appeared and pleaded "no rent in arrear."

After this plea was interposed, the plaintiff, by leave of court, filed the common counts in *assumpsit*, as an amendment to the distress warrant, and to this the defendant pleaded *non-assumpsit*, and set-off.

The issues thus formed were, by agreement of the parties, submitted to the court for trial without a jury; and after the hearing of the proof and arguments, the court ordered "that plaintiff's declaration in *assumpsit*, and defendant's plea of general issue be stricken from the files," for the following reasons: (*Here insert the ground for the same;*) and thereupon the court found the issue for the defendant, and assessed his damages at the sum of — dollars, for which a judgment was rendered in favor of the defendant, and against the plaintiff.

That during the progress of said trial the following questions of law did

¹ See *Cox v. Jordan*, 86 Ill. 560.

arise and were determined by me, as such judge, in said cause, that is to say :

First. Whether or not said plaintiff had a right to amend his distress warrant, so as to make the same cover claims and demands outside of and not covered by the claim and demand for rent, by adding the common counts for goods, wares and merchandise sold and delivered, work and labor done, money loaned, etc.

Second. Whether or not, under an amendment to the distress warrant covering the aforesaid claims and demands of the plaintiff, outside of the claims and demands for rent, the plaintiff had the right to make proof of such outside claims and demands.

Third. Whether or not, in case of distress for rent, the tenant having entered his appearance, and filed a claim of set-off greater in amount than the landlord's claim for rent, the landlord had the right, under any amendment which could be legitimately allowed to the distress warrant, to present and make proof of other claims and demands against the tenant, outside of the claim and demand for rent upon which the distress for rent was based.

Fourth. Whether or not, upon the trial of a proceeding based upon distress for rent by the landlord against the tenant, when the tenant has entered his appearance in said cause, the plaintiff has the legal right to plead and make proof of claims and demands outside of claims and demands for rent upon which the distress for rent was based, and not growing out of, or dependent upon the relation of landlord and tenant, and recover a judgment against the defendant in such suit or proceeding for such outside claims and demands, if the proof warrants such judgment.

And I further certify that each and all of said questions were determined by the undersigned, as judge of said court, against the plaintiff, the undersigned holding that the claims and demands, outside of the claims and demands for rent, could not be pleaded and given in evidence by the landlord in such a proceeding, but that the tenant had the right to plead and prove matters of set-off against the landlord, to which ruling of the court the plaintiff then and there excepted, and prayed an appeal to the appellate court; and now by the assent of the parties litigant, the foregoing questions or points of law, and the decisions thereon, are hereby certified to the appellate court (or supreme court) of the state, for review, in conformity with the statute in such case made and provided.

Dated, etc.

—, Judge.

No. 372. Agreement as to questions of law arising in the case.

(Under Sec. 75 of the Practice Act.)

(*Venue, and title of cause as in No. 367, ante.*)

We, the undersigned, E. F., attorney for the plaintiff, and G. H., attorney for the defendant in the above entitled cause, tried and finally determined in said court, in pursuance to the mutual agreement of the respective parties, and the statute in such case made and provided, do hereby agree, and certify as to the questions or points of law arising in the progress of

the trial of said cause; and that the same may be filed in said court; and that a copy of such certificate, certified by the clerk of said court, with the decision thereon, and the final decision in the case, may be certified to the appellate court (*or supreme court*), and filed therein, that is to say:

That this was an action of *assumpsit*, and an attachment issued thereon in favor of the plaintiff, and was levied upon the real estate of the defendant. That the cause assigned in the affidavit for issuing of the attachment, was that the defendant was a non-resident of the State of Illinois. That the defendant appeared, and filed a plea in abatement to the writ, denying that at the time of the issuing of the writ, he was a non-resident of the state.

On the trial, the plaintiff proved that at the time the writ in attachment was issued, which was on the 20th day of August, 1878, the defendant was in Minnesota, and had been there since he left Chicago, in April, 1878; and to sustain the allegation of his affidavit, he testified that the defendant told him before he left Chicago, that he was going to Minnesota to reside permanently. A witness also testified on behalf of the plaintiff, that a few days before the attachment was sued out, he saw the defendant in Minneapolis, who then told him that he intended residing in Minnesota, and had come there to reside, and never intended to return to Illinois to live.

The defendant, to prove the issue raised by his plea, testified that he did not have the conversation testified to by plaintiff and his witness; that he went to Minnesota with no intention of residing there, but upon business; that he was a single man, and always intended to return to Chicago; and did return there a short time after this suit was commenced, and has resided there ever since.

The defendant then offered to read in evidence the deposition of G. A., who deposed substantially that about the time the defendant left Chicago, he told him he was going away that afternoon or the next day, to St. Paul or Minnesota, to collect money that was due him. That the money was due and he did not expect to have much trouble, and that he would not be gone a great while. Also, the deposition of R. B., who deposed that in the latter part of March, or the beginning of April, a few days before the defendant left, he had a conversation with him, in which the defendant told him that he was going to make a trip to Minnesota where he was acquainted with millers; and the witness, who was in the flouring business, suggested he would introduce him to the firm of G. S. & Co., for the purpose of establishing some business relations; and after the introduction, witness thinks the defendant suggested that on his return he would make permanent arrangements with the firm either for a stipulated salary or a certain commission, on all the consignments received here through his instrumentality. And also the deposition of E. S., who testified that in the latter part of April, 1878, he had a conversation with the defendant, who told him he would start for St. Paul to arrange some business matters of which he had previously spoken, about a certain draft of \$1,000, which was withheld, and also to make arrangements with regard to shipments of flour to this market; and that he might be gone two weeks or a month.

To the reading of these depositions, and each of them, the plaintiff objected, on the ground that such evidence was incompetent; and the court,

sustaining the objection, excluded the testimony from the jury. To which rulings of the court the defendant then and there excepted. Whereupon a verdict was rendered for the plaintiff; and on overruling a motion in writing to set aside the verdict and for a new trial, to which the defendant excepted, the court rendered a judgment against the defendant.

And we, the attorneys, as aforesaid, hereby agree and certify as to the questions or points of law arising in the case, which are as follows, viz.:

First. Whether or not, the depositions of G. A., R. B. and E. S., offered by the defendant, and excluded by the court, were competent testimony in this cause.

Second. Whether or not the court erred in denying the defendant's motion to set aside the verdict of the jury and for a new trial, on the ground of the refusal of the court to permit said depositions to be read to the jury.

Dated, etc.

E. F., Attorney for Plaintiff.

G. H., Attorney for Defendant.

No. 373. Decision of the judge upon the questions of law arising in case finally determined.

(Under Sec. 75, Practice Act.)

(*Venue, and title of cause as in No. 367, ante.*)

The parties litigant having assented and agreed as to the questions or points of law arising in this cause, and the same having been certified by the counsel or attorneys of the respective parties, who have signed their names thereto, and such certificate having been filed in this court, the undersigned, judge of said court, does determine the said several questions or points of law arising in the case, in favor of the plaintiff; the undersigned, as such judge, holding that the said testimony contained in said depositions, and each of the same was incompetent; and that the court did not err in overruling the defendant's motion to set aside the verdict of the jury and for a new trial, on the ground of the refusal of the court to permit said depositions to be read to the jury.

To which determination of the court the plaintiff then and there excepted, and prayed an appeal to the appellate court. And the foregoing questions or points of law, and this decision thereon, and the final decision in this cause, are directed to be certified by the clerk of this court to the appellate court of this state for review, in conformity with the statute in such case made and provided.

Dated, etc.

—— Judge.

Rule 20 of the supreme court, and rule 16 of third district appellate court, provide that

“No judgment will be pronounced in any agreed case placed upon the docket of this court, unless an affidavit shall be filed setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy

between the parties, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.”¹

*No. 374. Affidavit that matters in agreed case are litigated in good faith.
(Venue, and title of cause as in No. 367, ante.)*

A. B., of, etc., on oath states that he is the plaintiff in the above entitled cause; that the matters presented by the record in said cause were litigated in good faith about matters in actual controversy between the parties hereto; and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matters in actual controversy between the parties to the record.

A. B.

Subscribed and sworn to, etc.

¹ 93 Ill. 7; 52 Ill. App. 680; Puterbaugh's Ch. Pl. & Pr. 956.

CHAPTER XXIX.

REFEREES.

Referring causes by agreement.—Section 1 of the act of 1872, entitled “An act to provide for referees in common law cases,”¹ provides

“That in all common law causes in courts of record, after issue joined or default entered, it shall be competent for the court, upon agreement of the parties or their counsel, to appoint one or more referees, not exceeding three, who shall have authority to take testimony in such cause, and report the same in writing, together with their conclusions of law and fact, to the court, and the court shall have power to render judgment upon the filing of such report; *provided*, either party may except to such report, and have his exceptions heard and determined by the court; and the court may, if necessary to take further evidence, refer the cause back to the referees, with instructions. Notice of the time of hearing such exceptions and taking of such further evidence shall be given under such rules as the court may prescribe.”

The power given to the court by the above section is a discretionary power, with the exercise of which the appellate court will not interfere unless it is clearly shown that it has been abused.²

The proceeding before a referee, being statutory, must in all substantial respects pursue the statute, or it can not be sustained. The statute quoted provides for the selection or appointment of no referee except by order of court. It authorizes no report by a referee except one containing the evidence heard and giving the referee's conclusions thereon, to which the parties are entitled to be heard on exceptions. If the

¹ 2 Starr & Curtis, 2003; Rev. Stat. (1895) 1245; Rev. Stat. (1893) 1161.

² *Pape v. People*, 19 Ill. App. 24.

report fails to give the evidence no judgment can be entered on it.¹

The appointment of a referee to try a common law controversy stands upon the same reason as the reference to a master of a similar controversy in chancery, and the proceedings should be similar.²

Where the parties to a suit at law make an agreement out of court to submit the cause to a third person, and that the court shall enter judgment on the finding of such third person, though not in compliance with the statute in reference to arbitration, or that concerning the appointment of a referee, the court may, by mutual consent, enter judgment upon the finding, but if it is objected to, the trial must proceed as at common law.

This is well illustrated by reference to kindred cases where causes pending are submitted to arbitration with an agreement that judgment may be rendered thereon under the statute. In such cases it is held that nothing but a strict substantial compliance with the statute will authorize the court to enter a judgment upon the award.³ The referee is an officer of the court, and can only be appointed by an order of the court.⁴

Oath of referee.—It has been held that the taking of an oath is a pre-requisite to the power of an auditor or referee to proceed with his duties,⁵ but the objection will be deemed waived by the appearance of the parties and the examination of witnesses without objection.⁶

Exceptions to report—When to be made.—Exceptions to the report of the referee must be made in the court from which the reference is taken. Where no objections are taken in the court below, they will not be considered in the appellate or supreme court upon appeal or writ of error.⁷

¹ *Morey v. Mower Co.*, 90 Ill. 307.

² *Pardridge v. Ryan*, 35 Ill. App. 230.

³ *Low v. Nolte*, 15 Ill. 368; *Weinz v. Dopler*, 17 Ill. 111; *Morey v. Mower Co.*, 90 Ill. 307.

⁴ *Hoffman on Referees; Morey v. Mower Co.*, 90 Ill. 307.

⁵ *Pardridge v. Ryan*, 134 Ill. 247; but see same case, 35 Ill. App. 230.

⁶ *Pardridge v. Ryan*, 134 Ill. 247; same case, 35 Ill. App. 230.

⁷ *Stock Yards v. Himrod*, 88 Ill. 410; *Pape v. People*, 19 Ill. App. 24; *Butler v. Cornell*, 148 Ill. 276.

The report and findings of a referee under the statute in reference to the facts, are regarded in the same light as the verdict of a jury, and should not be set aside or disturbed, except upon such grounds as would justify the setting aside of a verdict and granting a new trial.¹

Attendance of witnesses—Oaths.—Section 2 of the same act provides that

“Witnesses may be required to attend and testify before such referees in the same manner as is or may be provided by law in cases before masters in chancery; and such referees shall have power to administer oaths to witnesses.”

Judgment—Referee’s fees—Costs.—By section 3, it is provided, that

“Upon final hearing of the cause the court shall render judgment, and shall tax as costs against the unsuccessful party such fees, for the services of the referees, as shall, in the judgment of the court, be reasonable and proper, not to exceed \$5 per day; *provided*, that whenever the parties to any such suit, or their counsel, shall, in writing, to be filed in court, agree upon a larger or less sum per day, then the court shall be authorized to tax as part of the costs in such case the per diem so agreed upon.”

Testimony—Record.—It is provided in section 4, that

“All testimony taken before referees shall be subscribed by the witnesses, and the same, together with all exhibits and papers introduced in evidence, and the report of the referees, shall be included in and form a part of the record of the cause.”

No. 375. Agreement to refer cause to referees.

In the — Circuit Court.

— Term, A. D. 18—.

A. B. }
vs. } *In Assumpsit.*

C. D. } The above named plaintiff and defendant hereby mutually agree that the court may appoint one or more referees, not exceeding three, to be authorized to take the testimony in such cause, and report the same in writing, together with their conclusions of law and facts, to the court, in pursuance of the statute in such case made and provided.

Dated, etc.

A. B.

C. D.

¹ *Scott v. Maxwell*, 18 Ill. App. 72; *v. Sutrick*, 22 Cal. 471; *Edwards Butler v. Cornell*, 148 Ill. 276; *Keller on Referees*, 131.

*No. 376. Order appointing referee.**(Title of cause.)*

Upon the agreement of the parties hereto, it is ordered that E. F. be, and he is hereby appointed referee, with authority to take testimony in this cause, and report the same in writing, together with his conclusions of the law and facts in this cause, to the court; pursuant to the statute in such case made and provided.

*No. 377. Report of referee in favor of the plaintiff.**(Venue and title of cause.)*

To the Honorable Judge of said court:

In pursuance of an order of this court made in the above entitled cause, on, etc., appointing the undersigned referee, with authority to take testimony in this cause, and report the same in writing, together with his conclusions of the law and facts in said cause, to the court, the undersigned, referee, respectfully reports, that having first given a written notice to the said parties, respectively, of the time and place when and where the said testimony would be taken, and caused to come before him, as such referee, all such witnesses as the respective parties desired or made known to him, and having been attended by the attorneys of the respective parties, the undersigned, as such referee, did, on, etc., at, etc., proceed to take the testimony of the respective parties; and the several witnesses attending, having been severally sworn and examined, he, as such referee, reduced their testimony to writing, and herewith reports the same, to be filed in said cause.

The undersigned would further report, that, having examined the law and facts in said cause, he reports his conclusions thereon as follows, that is to say:

Upon the facts in the case he concludes and finds:

First. That, etc. *(Here insert the facts as found.)*

Second. That, etc. *(And so on.)*

And upon the law of the case his conclusions are:

First. That, etc.

Second. That, etc. *(And so on, inserting the conclusions of the referee upon each legal point.)*

The undersigned, as such referee, finds (*) that there is due to the plaintiff, A. B., from the defendant, C. D., the sum of — dollars, besides the costs of suit.

All of which he, as such referee, respectfully reports to the court.

Dated, etc.

E. F. Referee.

No. 378. Report of referee in favor of the defendant.

(As in the last form to the (), and then as follows:)* that there is nothing due from the defendant, C. D., to the plaintiff, A. B.

All of which, etc. *(As in the last form.)*

No. 379. Exceptions to report of referee.

(Venue and title of cause.)

Exceptions of the defendant (*or plaintiff*) to the report of the referee, filed in said cause, on, etc.

First. For that the said referee in his first findings of fact has erroneously found, etc. (*Here insert the ground of exception.*)

Second. For that the said referee in his second findings of fact has erroneously found, etc.

Third. For that, etc., (*and so on.*)

Fourth. For that the following facts are not stated in the findings of fact in the said report, viz.: That, etc., (*here insert.*)

Fifth. For that the first of the conclusions of law contained in the said report is erroneous.

Sixth. For that the second of the conclusions of law contained in the said report is erroneous.

Seventh. For that the said report is in favor of the plaintiff (*or defendant*), whereas it should have been in favor of the defendant (*or plaintiff*).

Eighth. For that the following conclusions of law upon the facts in the case are not contained in the said report, viz.: That, etc. (*Here insert.*)

Wherefore the defendant (*or plaintiff*) excepts to the said report, and appeals therefrom to the judgment of this court.

———, Attorney for ———.

CHAPTER XXX.

ATTORNEYS AND COUNSELORS AT LAW.

An attorney at law is an officer of a court of justice, who is employed by a party in a cause to manage the same for him. Appearance by an attorney has been allowed in England from the time of the earliest records of the courts of that country. They are mentioned in Glanville, Bracton, Fleta and Britton; and a case turning upon a party's right to appear by attorney is reported in the Year Book, 17 Edw. III., A. D. 1344.¹

It results from the nature of their functions, and of their duties, as well to the court as to the client, that no one can, even by consent, be the attorney of both the litigating parties in the same controversy.²

The name of attorney is given to those officers who practice in courts of common law; solicitors in courts of equity; and proctors in courts of admiralty, and in the English ecclesiastical courts.³

How admitted.—The question as to who may be admitted as an attorney, is to be determined by the rules and regulations established on the subject in the several states. Every state in the Union has laws by which the right to practice in its courts may be granted, and the right is very generally made to depend upon good moral character, the learning, and professional skill of the party on whom the privilege is conferred. The right to admission in no sense depends upon citizenship of the United States.⁴ But a citizen of one state is not entitled, as a matter of right, to admission to the bar of another state.⁵

¹ 1 Bouv. L. D. 140.

² See Bac. Abr., tit. Attorneys, c; *Valentine v. Stewart*, 15 Cal. 387; *Com. v. Gibbs*, 4 Gray 146; *Sher-*

wood v. R. R. Co., 15 Barb. 650; *Price v. Railroad*, 18 Ind. 137.

³ 1 Bouv. L. D. 206.

⁴ *Bradwell v. State*, 16 Wall. 130.

⁵ *Matter of Henry*, 40 N.Y. 560.

Qualifications.—Attorneys are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. It is the general practice in this country to obtain this evidence by a personal examination of the parties making application for admission. And where the law provides for an examination of applicants for admission to the bar, before their admission, a candidate ought not to be admitted without attending in person at the time of the hearing, even when physically disabled at the time from coming.¹

In regard to the inquiry as to the moral character of an applicant for admission, the court is not limited to the certificate, but may look behind it, and is bound to do so in cases attended with suspicious circumstances.²

Rule 2 of the supreme court of the United States provides that

“It shall be requisite to the admission of attorneys or counselors, to practice in this court, that they shall have been such for three years past in the supreme courts of the states to which they respectively belong, and that their private and professional character shall appear to be fair.”

In this state a candidate for examination must have pursued a regular course of law study in the office of some lawyer in general practice for at least two years. If such applicant shall have been in attendance in a law school as a student at law, the time thus spent may be considered as a part of the two years. If the applicant presents a diploma regularly issued by any law school, regularly organized under the laws of this state, whose regular course of law studies is two years, and requiring an actual attendance by the student of at least thirty-six weeks in each of said years, he may be admitted upon such diploma without examination.

No recovery can be had by any unlicensed attorney for services rendered in a court of record, notwithstanding a contract providing therefor.³

¹ *Ex parte Snelling*, 44 Cal. 553; Y. 67; *Strother v. Missouri*, 1 Mo. 1 Wait's Ac. & Def. 432. 605.

² *Attorney's License*, 21 N. J., Law 345; *Matter of Cooper*, 22 N. ³ *City v. Freels*, 17 Ill. App. 339; *Sellers v. Phillips*, 37 Ill. App. 74;

As to licensing attorneys and penalties for misconduct, see Puterbaugh's Ch. Pl. & Pr.

Authority of attorneys, etc.—The mere appearance of an attorney is generally deemed sufficient for the opposite party, and for the court, who will look no further, and will proceed as if he had sufficient authority, and leave any party who may be injured to his action against the attorney, unless there appears to be fraud or collusion in the case.¹ The public office which he bears, the oath under which he acts, and, it may be added, the experience of the general integrity and fidelity of the profession, have operated to establish a usage, and make that usage law, that except in extreme cases, the appearance of an attorney for a party will in general bind him.² The case is strongly analogous to that of sheriffs and other returning officers. Their returns are taken to be true, and are not permitted to be contradicted; and if false, the remedy is by an action against them. Kent, C. J., says, that "by licensing attorneys, the courts recommend them to the public confidence; and if the opposite attorney, in the business of a suit, must always, at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience."³

An attorney at law, when acting in good faith, and his client makes no objection to his management of the cause, has the power to waive or withdraw a defense and consent to judgment, but not to fraudulently sell out his client's interests to the opposite party; and the courts will protect suitors from the treachery of their solicitors, as far as possible.⁴

The authority of an attorney to appear in a case will always be presumed, until the contrary appears;⁵ but where the

Tedrick v. Hiner, 61 Ill. 189;
Hughes v. Dougherty, 62 Ill. App. 464.

¹ *Smith v. Stewart*, 6 Johns. 34;
Denton v. Noyes, 6 Johns. 296; *Osborn v. Bank*, 9 Wheat. 738; *Williams v. Butler*, 35 Ill. 544; *Rust v. Frothingham*, Breese 331; *Chambers v. Hodges*, 23 Tex. 104; *Lawson v. Bettison*, 12 Ark. 401; *Sampson v. Ohleyer*, 22 Cal. 200; *Moulton v. Bowker*, 115 Mass. 36.

² *Hart v. Waterhouse*, 1 Mass. 432; 8 Mass. 113; *Foster v. Wiley*, 27 Mich. 244; *Moulton v. Bowker*, 115 Mass. 36.

³ *Denton v. Noyes*, 6 Johns. 302; *Rice v. Wilkins*, 21 Maine 558; *Ryan v. Doyle*, 31 Iowa 53; *Cameron v. Stratton*, 14 Bradw. 270.

⁴ *C. B. Soc. v. Hass*, 111 Ill. 176.

⁵ *Ransom v. Jones*, 1 Scam. 291;

court is satisfied that an attorney has commenced a suit in the name of another, without authority, the suit will be dismissed.¹ Whatever may be the true rule in regard to the question as to what extent, for what purposes and under what circumstances a party for whom an appearance to a suit has been entered can deny the authority of the attorney, and ask relief from the court, the claim to do so is viewed with great disfavor by courts, whenever innocent third parties have acquired rights under the judgment or decree.²

Where an attorney enters the appearance of a defendant without authority a judgment or decree based upon such act is void, and may be collaterally attacked.³ If it is desired to raise the question of the authority of an attorney to appear and plead for such parties as he claims to represent, it may be done by affidavit; and the court will hear counter affidavits upon the question.⁴ The court will order an attorney to show his authority to sue, when a due regard to the rights of the defendant seems to demand it.⁵ But the reasons must be strong. If a respectable and responsible attorney appears for a party, the court will not ordinarily inquire into the fact whether he was actually authorized to appear or not.⁶

The rule that the authority of an attorney will be presumed, and his acts binding on the person for whom he appears, has not been applied to acts and transactions out of court.⁷ An attorney who is employed to defend a suit is not authorized to confess a judgment against his client without his consent.⁸ But where he has been employed in anticipation of a suit he may waive service on his client.⁹

In an action upon a record of a foreign judgment, which

Lawrence v. Jarvis, 32 Ill. 304; *Reed v. Curry*, 35 Ill. 536; *Williams v. Butler*, 35 Ill. 544; *Harris v. Galbraith*, 43 Ill. 309; see *Sanderson v. LaSalle*, 117 Ill. 171.

¹ *Frye v. County*, 14 Ill. 132; see *Williams v. Butler*, 35 Ill. 544; *Fence Co. v. Wernsing*, 19 Bradw. 42.

² *Kenyon v. Shreck*, 52 Ill. 382.

³ *Griggs v. Gear*, 3 Gilm. 2; *Bruschke v. Verein*, 145 Ill. 433.

⁴ *Reed v. Curry*, 35 Ill. 536; see *Harris v. Galbraith*, 43 Ill. 309.

⁵ *Frye v. County*, 14 Ill. 132.

⁶ *Republic v. De Arangois*, 5 Duer (N. Y.) 643; *Miller v. Lane*, 13 Bradw. 648.

⁷ *Hart v. Waterhouse*, 1 Mass. 433; *Brooks v. Kerns*, 86 Ill. 547.

⁸ *People v. Lamborn*, 1 Scam. 124.

⁹ *Hefferman v. Burt*, 7 Clarke (Iowa) 320.

shows that there was no service of process, but that the appearance of the defendant was entered by an attorney, it may be shown that the attorney who entered the appearance did so without authority, and thereby a recovery upon the judgment may be defeated.¹

An attorney employed to collect a debt can only obtain judgment, have execution issued, and receive and receipt for the proceeds. He can not compromise the debt, give day of payment, or receive a less amount, or anything but money in satisfaction.² He has no power to sell his client's judgment; and an attempted sale will only bind the client when the act is ratified or adopted by the receipt of money, or otherwise.³ Nor has an attorney a right to give up securities of his client, without actual payment, or special authority.⁴

In ordinary cases, where an attorney is employed to take the care and management of a suit, he has a right to consider his employment as continuing to the end of the litigation in that court, unless discharged by his client.⁵ But the power of an attorney ceases upon the termination of the relation, after which any and all acts of an attorney, whether in the matter of receiving the benefits of a judgment or decree, or releasing errors of record, or otherwise, are unwarranted, and do not bind the client.⁶ The mere employment of an attorney to attend to a cause in an inferior court, does not authorize his appearance in the same cause on appeal to a higher tribunal.⁷

Authority of, can not be delegated.—The authority of

¹ *Thompson v. Emmert*, 15 Ill. 415; see *Bimeler v. Dawson*, 4 Scam. 536; *Welch v. Sykes*, 3 Gilm. 197; *Whittaker v. Murray*, 15 Ill. 293.

² *Nolan v. Jackson*, 16 Ill. 272; *Stokely v. Robinson*, 34 Penn. 315; *State v. Hawkins*, 28 Mo. 366; *Miller v. Lane*, 13 Bradw. 648; *Wetherbee v. Fitch*, 117 Ill. 67; *Stocking v. Knight*, 19 Bradw. 501; see *Trumbull v. Nicholson*, 27 Ill. 149; *Jeter v. Haviland*, 24 Geo. 252; *Jones v. Wolcott*, 2 Allen 247; *Chapman v. Cowles*, 41 Ala. 103; *Ruckman v. Alwood*, 44 Ill. 183; *Wadhams v. Gay*,

73 Ill. 415; *Isaacs v. Zugsmith*, 103 Pa. St. 77; *Ins. Co. v. Buchanan*, 100 Ind. 63.

³ *Rowland v. Slate*, 58 Penn. St. 196; *Vickery v. McClellan*, 61 Ill. 311; *Lochenmeyer v. Fogarty*, 112 Ill. 572.

⁴ *Terhune v. Colton*, 2 Stockt. (N. J.) 21; *Jeter v. Haviland*, 24 Geo. 252; *C. B. Soc. v. Haas*, 111 Ill. 176.

⁵ *Langdon v. Tower*, 30 Vt. 285; *Phillips v. Edsall*, 127 Ill. 535.

⁶ *Ruckman v. Alwood*, 44 Ill. 183; see *Ruckman v. Alwood*, 40 Ill. 128; *Cameron v. Stratton*, 14 Bradw. 270.

⁷ *Covill v. Phy*, 24 Ill. 37.

an attorney is personal, and can not be delegated to another.¹

If a person engages the services of an association of lawyers, he is entitled to the services of every one of them; and if one abandons the retainer with the assent of the others, express or implied, or they attempt to supply his place with another attorney (though of equal or superior qualifications,) it will be no performance of the contract. It is personal, and can not be delegated to, or performed by, another.² So if attorneys who are partners accept a retainer, the contract is joint, and continues to the termination of the suit; and neither can be released from the obligation or responsibility assumed, either by a dissolution of their partnership, or by any other act or agreement between themselves,³ and the client will be entitled to the services of all.⁴

Retainer, etc.—It requires a retainer, or fee paid, to constitute the relation of attorney and client;⁵ and an attorney can not recover for services rendered as such, unless he can show an employment or retainer.⁶ It is not essential, however, to the right of recovery for professional services, that there should be an express request; but if the services were rendered under such circumstances as will reasonably imply that they were performed with the assent and at the request of the client, a recovery therefor may be had.⁷

Agreements.—All agreements made by an attorney with the opposite party, and entered of record, or made in writing and filed with the papers in the cause, are binding on his client. As to agreements not in writing, there may be doubts how far the courts will enforce them, or whether the performance must not be left to the honor of the attorney. As a general rule, courts refuse to enforce agreements made between attorneys, where the same are not in writing, or en-

¹ *Cornelius v. Wash*, Breese 98.

² *Morgan v. Roberts*, 38 Ill. 65;
Davis v. Peck, 54 Barb. 425.

³ *Walker v. Goodrich*, 16 Ill. 341;
Smith v. Harvie, 31 Ill. 62; *McGill v. McGill*, 2 Metc. (Ky.) 258; *Moshier v. Kitchell*, 87 Ill. 18.

⁴ *Bank v. Miller*, 47 Ill. App. 310.

⁵ *DeWolf v. Strader*, 26 Ill. 225;
Davis v. Peck, 54 Barb. 425; *Cavil-*
land v. Yale, 3 Cal. 108; see *John-*
ston v. Brown, 51 Ill. App. 549.

⁶ *R. R. Co. v. Larned*, 26 Ill. 218.

⁷ *Cooper v. Hamilton*, 52 Ill. 120.

tered of record.¹ They are, and should be, discouraged. In case of the death or change of the attorney who made them, his successor and the client would be without means of knowing them. If clearly proved, however, the court will see that the opposite party does not suffer, and perhaps performance would be compelled; but there is so much danger of mistake and disagreement, and attorneys so frequently differ with respect to them, that it should be invariably required that all important agreements should be put in writing, or entered of record.

Admissions.—Admissions made by attorneys, with a view to their being used as evidence, may be so used;² but casual admissions in the course of conversation, or not for that purpose, are not evidence against the client. An admission which is made for the purpose of a trial, is regarded as a stipulation of the party making it that the fact about which it is made exists, and he is estopped from denying it.³

Termination of employment.—The relation of attorney and client is one of mutual trust, confidence and good will; and any conduct on the part of the attorney which must necessarily put an end to these, justifies the client in terminating the relation by notice to the attorney.⁴

DUTIES AND LIABILITIES.

The duties of an attorney are care, skill and integrity. If he is not deficient in these requisites, he is not responsible for any error or mistake arising in the exercise of his profession;⁵ but a deficiency in skill or care, by which a loss ensues to his client, renders an attorney liable.⁶ He will be held liable for

¹ *Oliver v. Hart*, 35 Ill. 55; *Brookheim v. Ins. Co.*, 38 Cal. 623; *Rogers v. Greenwood*, 14 Minn. 333; but see *Ry. Co. v. Hintz*, 132 Ill. 265; *Thompson on Trials*, §§ 193, 200.

² *Bank v. Sprigg*, 11 Md. 389; 2 *Starkie Ev.* 136; *Smith v. Dixon*, 3 Metc. (Ky.) 438; *Yost v. Devault*, 9 Iowa 60.

³ *Mason v. Park*, 3 Scam. 532;

Burnham v. Smith, 11 Wis. 258; *Patterson v. Ely*, 19 Cal. 28; *Rogers v. Greenwood*, 14 Minn. 333.

⁴ *Arrington v. Sneed*, 18 Texas 135.

⁵ 1 *Tidd's Pr.* 225; *Pitt v. Yalden*, 4 Burr. 2060; see *People v. Ford*, 54 Ill. 520.

⁶ *Hastings v. Halleck*, 13 Cal. 203; *Swannel v. Ellis*, 1 Bing. 347; *Goodman v. Walker*, 30 Ala. 482;

any loss occasioned by a disobedience of the lawful instructions of his client.¹

If an attorney becomes the instrument for prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, but is actuated by malicious motives, he is liable to the injured party.²

Duty to court.—While an attorney at law owes his client the duty of fidelity, he also owes the duty of good faith and honorable dealing to the court before whom he practices. He is an officer of the court, and his high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice. He violates his oath of office when he resorts to deception or permits his client to do so. He is under no obligation to seek to obtain for his client that which is forbidden by the law.³

Ought not to be a witness for his client.—It is regarded as of very doubtful professional propriety for an attorney to become a witness for his client, without first entirely withdrawing from any further connection with the cause. An attorney occupying the attitude of both witness and attorney for his client, subjects his testimony to criticism, if not suspicion.⁴

It is sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client. It has therefore been held in numerous cases that the attorney in a cause is not, because such, disqualified from being a witness;⁵ even though his fee depends on his success;⁶ and though he expects a larger fee if he succeeds.⁷ But the practice of an attorney

Harter v. Morris, 18 Ohio St. 492;
Kimmell v. Bitner, 62 Penn. 203;
Stevens v. Walker, 55 Ill. 151;
Hughes v. Ziegler, 69 Ill. 38; *Newman*
v. Schueck, 58 Ill. App. 328.

¹ *Gilbert v. Williams*, 8 Mass. 57;
Nave v. Baird, 12 Ind. 318; *People*
v. Cole, 84 Ill. 327.

² *Burnap v. Marsh*, 13 Ill. 535;
Revill v. Pettitt, 3 Metc. (Ky.) 314;
Stockley v. Horridge, 34 Eng. C. L.
276; see *Moir v. Hopkins*, 16 Ill.
313; *Hardy v. Keeler*, 56 Ill. 152.

³ *People v. Beattie*, 137 Ill. 553.

⁴ *Ross v. Demoss*, 45 Ill. 447; see
Morgan v. Roberts, 38 Ill. 65.

⁵ *Cobbett v. Hudson*, 22 L. J. Q. B.
11; *Cobbett v. Hudson*, Ell. & B. 11;
Chartiers v. McNamara, 72 Penn.
St. 278; *Ball v. Renfro*, 3 Metc. (Ky.)

51; *Robinson v. Dauchy*, 3 Barb. 20.
⁶ *Newman v. Bradley*, 1 Dall.
(Penn.) 241.

⁷ *Boulder v. Hebel*, 17 S. & R. 32;
Miles v. O'Hara, 1 S. & R. 32; *Me-*
Gehee v. Hansell, 13 Ala. 17; *Slo-*
cum v. Newby, 1 Murph. (N. C.) 423.

testifying or making affidavit for his client, is considered objectionable,¹ and should be discountenanced as far as possible, by the courts and counsel.²

In *Little v. McKeon*, 1 Sandf. 607, the court said: "As to the effect of this practice upon the character of the bar, we think the evil will work its own cure. Attorneys, as well as counselors, of standing and character, will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on litigated questions, and in such cases only on some unforeseen necessity. Those gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients, soon become marked both by their associates and the courts, and forfeit in character more than will ever be compensated to them by success in such client's controversies."

Acting in another capacity.—A solicitor in a case can not act as a special master to execute the decree.³ And, as a general rule, a receiver in a cause can not appoint, as his attorney, the attorney of either party.⁴ And so a person who is administrator of an estate can not act as an attorney in the prosecution of claims against the same estate.⁵

Can not act on opposite sides.—An attorney owes to his client fidelity, secrecy, diligence and skill; and he can not, therefore, serve professionally, both parties to the controversy, nor accept a reward from the other side.⁶ So an attorney is never allowed to change sides in the same cause, though at different trials.⁷ But where an attorney, in the course of other business, had obtained a knowledge of matters connected with the suit in question, he will not generally be prevented from

¹ *Stratton v. Henderson*, 26 Ill. 68; *Spencer v. Kinnard*, 12 Tex. 180.

² *State v. Woodside*, 9 Ired. (N. C.) 496; *Frear v. Drinker*, 8 Penn. St. 520.

³ *White v. Hoffaker*, 27 Ill. 349.

⁴ *Branch v. Harrington*, 49 (How.) N. Y. 196; *Warren v. Sprague*, 4 Edw. Ch. (N. Y.) 416.

⁵ *Spinks v. Davis*, 32 Miss. 152; see *Bruce v. Dickey*, 116 Ill. 527.

⁶ 1 Wait's Pr. 243; *Herrick v. Catley*, 1 Daly (N. Y.) 512; *Herrick v. Catley*, 30 How. (Pa.) 208; *Sherwood v. R. R. Co.*, 15 Barb. (N. Y.) 650.

⁷ *Valentine v. Stewart*, 15 Cal. 387; *Gaulden v. State*, 11 Ga. 47; *Commonw. v. Gibbs*, 4 Gray (Mass.) 146; *Price v. R. R. Co.*, 18 Ind. 137.

acting against the party through whose business he obtained such knowledge, and counsel may act as such at the same time for both parties to a transaction; and the fact that a contract is drawn by and under the advice of one who, at the time, is counsel for one of the parties, when such fact is known to the other party, does not, in the absence of evidence of fraud or unfairness, invalidate or affect the contract.¹

Liability to third persons.—One who suffers an injury by an unauthorized appearance of an attorney for him, has a remedy by action against the attorney.² So an attorney and his client are both liable for an execution illegally issued by the former.³

An attorney may so act under his general employment to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest.⁴ He does not, however, incur any civil liability for ordering a levy on property, if he acts in good faith and on reasonable cause.⁵ And he is not chargeable with a trespass of the constable who has charge of the execution.⁶ Nor is he responsible for conveying to an officer his client's directions for seizing goods on an execution.⁷

Dealings between attorney and client.—The highest degree of good faith is required from an attorney, who, while the relation, and the confidence incident to it, exists, enters into bargains and dealings with his client.⁸ The confidential nature of the relation enables the attorney to exercise a strong influence over the actions of his client; puts it in his power to avail of his necessities, good nature, liberality and credulity; and hence the law not only watches over all the transactions

¹ *Joslin v. Cowes*, 56 N. Y. 626;
¹ *Wait's Ac. and Def.*, 448.

² *Smith v. Bowditch*, 7 Pick. 138;
Coit v. Sheldon, 1 Tyler (Vt.) 304;
Field v. Gibbs, Pet. (C. Ct.) 155.

³ *Newberry v. Lee*, 3 Hill (N. Y.) 523; *Armstrong v. Dubois*, 1 Abb. (N. Y.) 8; *Armstrong v. Dubois*, 4 Keyes (N. Y.) 291; *Foster v. Wiley*, 27 Mich. 244; *Foster v. Wiley*, 15 Am. Rep. 185.

⁴ *Burnap v. Marsh*, 13 Ill. 535;
Hardy v. Keeler, 56 Ill. 152.

⁵ *Hunt v. Printup*, 28 Ga. 297; see
Wigg v. Simonton, 12 Rich (S. C.) 583.

⁶ *Seaton v. Cordray*, Wright (Ohio) 102.

⁷ *Ford v. Williams*, 13 N. Y. 577.

⁸ *Mechem on Agency*, Secs. 877–879; *Weeks on Att.*, Sec. 268; *Morrison v. Smith*, 130 Ill. 304; *Rolfe v. Rich*, 149 Ill. 436; *Ross v. Payson*, 160 Ill. 349.

of parties in this predicament, but often interposes to declare void, transactions which, between other parties, would be held unobjectionable. So strict is the rule on this subject, that dealings between an attorney and his client are held, as against the attorney, to be *prima facie* fraudulent, and the burden rests upon the attorney to show fairness, adequacy and equity.¹

But the law does not prohibit an attorney from purchasing property from his client when the transaction is fair and honest, and in no manner tainted with fraud, undue influence or corruption.²

Assigned to defend prisoners.—Paragraph 482 of the criminal code provides that "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private."³

Courts, at common law, had the power, and it was their duty, to assign counsel to defend persons charged with crime, who were unable to employ counsel, and such has always been the practice in this state, and such power in the courts has never been questioned.⁴

The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations, which must be reciprocally enjoyed and performed. Counsel, when so assigned, but performs an official duty, for which no compensation is provided.⁵

¹ Weeks on Att., Sec. 268; *Atwood v. Mansfield*, 59 Ill. 496; *Bank v. Keeler*, 103 Ill. 425; *Elmore v. Johnson*, 143 Ill. 513; *Ross v. Payson*, 160 Ill. 349.

² *Bank v. Keeler*, 109 Ill. 385; *Atwood v. Mansfield*, 59 Ill. 496; *Hess v. Voss*, 52 Ill. 472; *Bibb v. Smith*, 1 Dana (Ky.) 582; *Mills v. Mills*, 26 Conn. 213; *Starr v. Vanderheyden*, 9 Johns. 253; *Downing v. Major*, 2 Dana (Ky.) 228; *Payne v. Avery*, 21 Mich. 524; *Rose v. Mynatt*, 7 Yerg.

(Tenn.) 30; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Mason v. Ring*, 3 Abb. C. A. (N. Y.) 210; *Roby v. Colehour*, 135 Ill. 300; *Rolfe v. Rich*, 149 Ill. 436; *Sutherland v. Reeve*, 41 Ill. App. 295; *Herr v. Payson*, 157 Ill. 244.

³ 1 Starr & Curtis, 861; Rev. Stat. (1895), 578; Rev. Stat. (1893), 536.

⁴ *Johnson v. Whiteside Co.*, 110 Ill. 22; *Vise v. County*, 19 Ill. 78.

⁵ *Johnson v. Whiteside Co.*, 110 Ill. 25; *Vise v. County*, 19 Ill. 78;

RIGHTS AND PRIVILEGES.

Privileged communications.—Communications made by a client to his attorney, with a view to obtaining professional advice or assistance, are privileged; and courts will not require or permit them to be divulged by the attorney, without the consent of his client, whose privilege it is.¹ No one can be compelled to disclose to the court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission.² But if he becomes a witness he becomes liable to full cross-examination.³

A statement made to an attorney is not privileged unless made with the object of obtaining professional advice.⁴ An attorney who is merely employed to draw a deed or mortgage, without giving any legal advice in regard thereto, can not decline to testify to statements made by his employer, on the ground that they are privileged communications.⁵

An attorney who has in his possession receipts which his client could be compelled to produce or disclose, can also be compelled to produce them, or testify as to their contents.⁶ An attorney's clerk is also privileged as to any communications between the attorney and his client, to the same extent that the attorney may be.

A communication made by a client to a person whom he supposed to be an attorney, and whom he employed as such,

see *County v. Waller*, 90 Penn. St. 99; *Rowe v. Yaab Co.*, 17 Cal. 61; *People v. Supervisors*, 28 How. (N. Y.) 22; *Wright v. State*, 3 Heisk. (Tenn.) 256; *Elam v. Johnson*, 48 Geo. 348.

¹ 1 Greenl. Ev., Sec. 237; *Daniel v. Daniel*, 39 Penn. St. 191; *Fossler v. Schriber*, 38 Ill. 172; *Hatton v. Robinson*, 14 Pick. 420; *People v. Barker*, 56 Ill. 299; *Thorp v. Goewey*, 85 Ill. 611; *Scott v. Harris*, 113 Ill. 447; see *Lynn v. Lyerle*, 113 Ill. 128; *Tyler v. Tyler*, 126 Ill. 525; *Swaim v. Humphreys*, 42 Ill. App. 370; *City v. Falver*, 27 Ill. App. 604.

² Wharton on Ev., Sec. 583;

Greenl. on Ev., 240; *Heminway v. Smith*, 28 Vt. 701; *Behler v. Rehner*, 43 Ind. 112; *State v. White*, 19 Kansas 445; *Swenk v. People*, 20 Ill. App. 111.

³ *Com. v. Mullen*, 97 Mass. 545; *Inhab. v. Henshaw*, 101 Mass. 200.

⁴ *Marsh v. Howe*, 36 Barb. (N. Y.) 649; 24 Ark. 346; 26 Tex. 273.

⁵ *De Wolf v. Strader*, 26 Ill. 225; *Woodruff v. Hurson*, 32 Barb. 575.

⁶ *Andrews v. R. R. Co.*, 14 Ind. 169; *Borum v. Fouts*, 15 Ind. 50; *Ex parte Maulsby*, 13 Md. 625; *People v. Sheriff*, 29 Barb. 622; see *Gray v. Fox*, 43 Mo. 570.

but who, although acting as an attorney, was not in fact admitted, are not privileged.¹ While an attorney may not disclose the confidential communications of his client, he may testify to facts he learns or knows from other sources than from the relation of attorney and client.²

Fees.—An attorney can not recover for services rendered as such unless he can show an employment or retainer;³ and it requires a retainer, or fee paid, to constitute the relation of attorney and client.⁴ Agreements for contingent fees to attorneys are not against law or public policy.⁵

If an attorney is employed, for a stipulated fee, to prosecute a suit to a final judgment, and his client, during the progress of the cause, dismisses him without any fault on his part, he is entitled to payment for the services already rendered, if not to the stipulated fee.⁶

An attorney can not recover for services which, through his own neglect, proved to be of no value to his client.⁷ A client can not, at his own option, by the employment of additional counsel, reduce the amount of the compensation or fee which he had stipulated to pay to the original attorney.⁸

Lien.—At common law, an attorney has a lien for his fees upon any papers of his client which may come into his hands,⁹ and this is not confined to any particular case, but extends to his whole account.¹⁰ In Illinois an attorney has a general lien upon all papers, documents, etc., of his client placed in his hands in his professional character or in the course of his professional business.¹¹

¹ *Sample v. Frost*, 10 Iowa 266; *Foster v. Hall*, 12 Pick. 89; *McLaughlin v. Gilmore*, 1 Bradw. 563; *Inhab. v. Henshaw*, 101 Mass. 200.

² *Chillicothe v. Jameson*, 48 Ill. 281; *Staley v. Dodge*, 50 Ill. 43.

³ *R. R. Co. v. Larned*, 26 Ill. 218.

⁴ *DeWolf v. Strader*, 26 Ill. 225; see *Johnston v. Brown*, 51 Ill. App. 549.

⁵ *Newkirk v. Cone*, 18 Ill. 449; see *Fraatz v. Garrison*, 83 Ill. 60; *Badger v. Gallaher*, 113 Ill. 662; *People v. Murphy*, 119 Ill. 159.

⁶ *Jones v. Morgan*, 39 Geo. 310;

Wood v. Anders, 5 Bush (Ky.) 601; *Quint v. Mining Co.*, 4 Nev. 304; *Myers v. Crockett*, 14 Tex. 257.

⁷ *Nixon v. Phelps*, 29 Vt. 198.

⁸ *Randall v. Archer*, 5 Florida 438.

⁹ *Hughes v. Mayre*, 3 T. R. 275; *Mitchell v. Oldfield*, 4 T. R. 123; *Tidd's Pr.* 337.

¹⁰ *Stephens v. Blalock*, 1 M. & S. 535; *Ward v. Craig*, 87 N. Y. 551; *St. John v. Diefendorf*, 12 Wend. 261; *Smith v. Young*, 62 Ill. 210; *Walker v. Sargant*, 14 Vt. 247.

¹¹ *Sanders v. Seelye*, 128 Ill. 631; *Dinsmoor v. Bressler*, 56 Ill. App. 207.

It seems, however, that he has no charging or special lien upon the subject-matter of the suit,¹ but he may by agreement with his client acquire an equitable lien as against him in the judgment recovered, or the subject-matter of the litigation and proceeds thereof, for his fees and disbursements in the case.²

Change of attorney.—An attorney can not withdraw his appearance from a cause, nor can a party litigant substitute another attorney without notice to the parties in interest, and the judgment of the court is required upon the subject in order that the rights of all parties may not be unduly prejudiced.³

A party having appeared by one attorney can not make an application to the court by another, without having obtained an order for changing his attorneys. And till an order is obtained, the opposite party and his attorney are justified in considering the former attorney as being still employed, and are not bound to take notice of any proceedings in the name of another attorney.⁴

A plea filed by a new attorney without any order of the court for change of attorneys is irregular, and the complainant is not bound to accept such plea.⁵

¹ *Sanders v. Seelye*, 128 Ill. 631; *Forsythe v. Beveridge*, 52 Ill. 268; *Humphrey v. Browning*, 46 Ill. 476; *LaFrambois v. Grow*, 56 Ill. 197; *Henchey v. City*, 41 Ill. 136; *Nichols v. Pool*, 89 Ill. 491; *Bromwell v. Turner*, 37 Ill. App. 561; *Dinsmoor v. Bressler*, 56 Ill. App. 207.

² *Smith v. Young*, 62 Ill. 210; see *Patton v. Wilson*, 34 Pa. St. 299.

³ *Stock Exchange v. McClaughry*, 50 Ill. App. 358.

⁴ *Stock Exchange v. McClaughry*, 50 Ill. App. 358; 1 Tidd's Pr. 93; *Ginders v. Moore*, 1 B. & C. 654; *Cohen v. Smith*, 33 Ill. App. 344; *U. S. v. Curry*, 6 How. (U. S.) 106.

⁵ *Stock Exchange v. McClaughry*, 50 Ill. App. 358.

CHAPTER XXXI.

CHANGE OF VENUE IN CIVIL CAUSES.

Causes.—The statute of Illinois provides that “a change of venue in any civil suit or proceeding in law or equity, including proceedings for the exercise of the right of eminent domain, may be had in any of the following cases:

First. Where the judge is a party or interested in the suit, or his testimony is material to either of the parties to the suit, or he is related to, or shall have been counsel for either party in regard to the matter in controversy. In any such case a change may be awarded by the court in term time, with or without the application of either party.

Second. Where either party shall fear that he will not receive a fair trial in the court in which the suit or proceeding is pending, because the inhabitants of the county are or the judge is prejudiced against him, or the adverse party has an undue influence over the minds of the inhabitants. In any such case the venue shall not be changed except upon application, as hereinafter provided, or by consent of the parties.”¹

A change of venue in proceedings by information in the nature of a *quo warranto*,² and for *mandamus* against a county,³ and in any suit where a county is a party, may be taken.⁴

When the reasons for a change of venue cease to exist the necessity and the right to a change also cease.⁵

“Neither party shall have more than one change of venue.”⁶

¹ Rev. Stat. (1893) 1468; 2 Starr & Curtis 2448-9; Rev. Stat. (1895) 1570; see *Pierson v. Finney*, 37 Ill. 29; *Bruen v. Bruen*, 43 Ill. 408; *Coal Co. v. Merrick*, 79 Ill. 112; *Ins. Co. v. Tolman*, 80 Ill. 106; *Matter of Will of W. F. Storey*, 20 Bradw. 183; *Cassem v. Olson*, 45 Ill. App. 38.

² *People v. Shaw*, 13 Ill. 582; *Ensinger v. People*, 47 Ill. 384.

³ *McBane v. People*, 50 Ill. 503.

⁴ *County v. Hall*, 53 Ill. 440.

⁵ *Myers v. Walker*, 31 Ill. 353.

⁶ 2 Starr & Curtis 2452; Rev. Stat. (1893) 1469; Rev. Stat. (1895) 1571.

Notice.—A party desiring a change of venue must give notice of his intention at the earliest period. If the cause of the change is known in vacation, notice should be given, and the application made to the judge at chambers. The requirement of the statute as to notice is positive.¹

The notice to be given to the opposite party, or his attorney, may be in the following form:

No. 380. Form of Notice.

In the ——— Court.

C. D. }
ats. } *Assumpsit.*
A. B. }

To the above named A. B., *plaintiff.*

Take notice that on, etc., or as soon thereafter as counsel can be heard, the *defendant* will make an application to the (judge of the) said court (at, etc.), for a change of venue in this cause, on account of (*here state the ground of the application:*) and you can appear and resist such application if you see fit so to do.

(*Date.*)

——— *Att'y for Def't.*

The petition.—The statute of 1874 requires that

“Every application for a change of venue shall be by petition, setting forth the cause of the application and praying the change of venue; which petition shall be verified by the affidavit of the applicant.”

“If the cause for the change is the prejudice of the inhabitants of the county, or the undue influence of the adverse party over their minds, the petition shall set forth the facts upon which the petitioner founds his belief, and must be supported by the affidavits of at least two other reputable persons, resident of the county. The adverse party may controvert the petition by counter affidavits, and the judge may grant or deny the petition, as shall appear to be according to the right of the case.”²

¹ Rev. Stat. (1895), 1571: see *Bryson v. Crawford*, 68 Ill. 362; *Graves v. Shoefelt*, 60 Ill. 462; *Moore v. Ellsworth*, 51 Ill. 308; *Marble v. Bonhotel*, 35 Ill. 240; *Kelly v. Downs*, 29 Ill. 74; *Utley v. Burns*, 70 Ill. 162; *Ry. Co. v. Marfield*, 72 Ill. 95; *Ry.*

Co. v. Eddy, 72 Ill. 138; *McCann v. People*, 88 Ill. 103; *Miller v. Pence*, 132 Ill. 149.

² 2 Starr & Curtis, 2450; Rev. Stat. (1893) 1463; Rev. Stat. (1895) 1571; see *Hall v. Barnes*, 82 Ill. 223; *Gitchell v. People*, 45 Ill. App. 116.

*No. 381. Form of petition on account of the prejudice of a judge.**(Title of court, etc., as in No. 380.)*

The petitioner, C. D., *defendant* in this cause, respectfully shows to the (judge of the) said court that he, the petitioner, fears that he will not receive a fair trial in the said court, on account that the judge thereof is prejudiced against him, the petitioner, so that he can not expect a fair trial in the said court, and that a knowledge of such prejudice did not come to the petitioner until, etc. He therefore prays a change of venue in this cause, pursuant to the statute in such case made and provided. C. D.

(Title of court, etc., as in No. 380, ante.)

C. D., *defendant* in this cause, makes oath and says, that the foregoing petition is true in substance and in fact. C. D.

Subscribed and sworn to, etc.

*No. 382. Form of petition on account of prejudice of inhabitants, etc.**(Title of court, etc., as in No. 380.)*

The petitioner, C. D., *defendant* in this cause, respectfully shows to the (judge of the) said court that he, the petitioner, fears that he will not receive a fair trial in the said court, on account that the inhabitants of the said county of — are prejudiced against the petitioner (or that A. B., plaintiff in this cause, has an undue influence over the minds of the inhabitants of said county of —) so that the petitioner can not expect a fair trial in the said court; and that he, the petitioner, did not ascertain the existence of such prejudice (or influence) until within the last — days; and that he, the petitioner, founds his belief upon the following facts, etc. (*Here set forth the facts upon which the petitioner founds his belief.*) The petitioner therefore prays a change of venue in this cause, pursuant to the statute in such cases made and provided. C. D.

(*Add affidavit as in last precedent, also affidavit of two residents.*)

When application may be made.—"The application may be made to the court in which the cause is pending in term time, or to the judge thereof in vacation; reasonable notice thereof having been given to the adverse party or his attorney."

"No application for a change of venue after the first term shall be allowed, unless the party applying shall have given to the opposite party ten days' previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than ten days before the making of the application."

"No change of venue shall be granted after the first term of the court at which the party applying might have been heard, unless he shall show that the causes for which the

change is asked has arisen or come to his knowledge since the term at which the application might have been made.”¹

By whom application must be made.—An application for a change of venue must be made by a party to the record.² But when a corporation applies, any recognized officer thereof may make the requisite affidavit.³

By part of plaintiffs or defendants.—“When there are two or more plaintiffs or defendants, a change of venue shall not be granted unless the application is made by or with the consent of all the parties, plaintiff or defendant, as the case may be; *provided*, that in proceedings for the condemnation of property, when the application is by or against all the owners of any parcel of property to be condemned, a change of venue may be made of so much of the case as affects them, if it can be done without prejudice to the other defendants or plaintiffs in such proceeding.”⁴ Where a part of the defendants have let judgment go by default they need not join in the application.⁵ When a part of the defendants who were served with process obtained a change of venue, other defendants afterwards served were held not bound by such order.⁶

Order in vacation.—“When a change of venue is granted in vacation, the judge granting it shall immediately transmit the petition and affidavits, and his order directing the change of venue, to the clerk of the court in which the cause is pending, who shall file the same in his office, and make an entry of such order on the records of the court.”

Terms and conditions.—“The order for a change of venue may be made subject to such equitable terms and conditions as safety to the rights of the parties may seem to require, and the judge in his discretion may prescribe.”

¹ 2 Starr & Curtis, 2451-2; Rev. Stat. (1895), 1571; Rev. Stat. (1893), 1469; see *Reeves v. Reeves*, 59 Ill. 203; *Ry. Co. v. Eddy*, 72 Ill. 139; see *Bryson v. Crawford*, 68 Ill. 362; *Ry. Co. v. Mitchell*, 74 Ill. 394; *Hudson v. Hanson*, 75 Ill. 198; *Richards v. Green*, 78 Ill. 525; *Harding v. Town*, 83 Ill. 501; *White v. Murtland*, 71 Ill. 250; *Gager v. Edwards*, 26 Ill. App. 487.

² *Crowell v. Maughs*, 2 Gilm. 419.

³ *Ins. Co. v. Mehlman*, 48 Ill. 313.

⁴ 2 Starr & Curtis, 2452; Rev. Stat. (1893), 1469; Rev. Stat. (1895), 1571; see *Schmidt v. Mitchell*, 84 Ill. 195.

⁵ *Hitt v. Allen*, 13 Ill. 592; *Wight v. Meredith*, 4 Scam. 360; see *Hili v. Gruell*, 42 Ill. App. 411.

⁶ *Albin v. Talbott*, 46 Ill. 424.

Costs of the change.—"The expenses attending a change of venue shall be taxed by the clerk of the court from which the case is certified, according to the rate established by law for like services, and shall be paid by the petitioner, and not taken as a part of the costs in the suit."

When to be paid.—"The order shall be void unless the party obtaining a change of venue shall, within fifteen days, or such shorter time as the court or judge may prescribe, pay to the clerk the expenses attending the change."

"Where the venue is changed without the application of either party, the costs of such change shall abide the event of the suit."¹

Transcript papers, etc.—"In all cases of changes of venue the clerk of the court from which the change is granted shall immediately make out a full transcript of the record and proceedings in the case,*and of the petition, affidavits and order for the change of venue, and transmit the same, together with all the papers filed in the case to the proper court; *provided*, that when the venue is changed, on behalf of a part of the defendants to a condemnation proceeding, it shall not be necessary to transmit the original papers in the case, but it shall be sufficient to transmit certified copies of so much thereof as pertains to the case so changed. Such transcript and papers or copies may be transmitted by mail, or in such other way as the court or judge may direct."²

All objections to the transcript should be made at the earliest period,³ and all exceptions will be waived if parties proceed to trial.⁴

To what court.—"When a change of venue is granted it may be to some other court of record of competent jurisdiction in the same county, or in some other convenient county, to which there is no valid objection; *provided*, that when the action is pending in either the circuit or superior court of Cook

¹ 2 Starr & Curtis, 2453; Rev. Stat. (1893) 1469; Rev. Stat. (1895) 1571-2; see *English v. Faulds*, 58 Ill. 266.

² *Ib.*; see *Yates v. People*, 38 Ill. 527; see *Wright v. Kirk*, 4 Scam. 339; *English v. Faulds*, 58 Ill. 266; *Heacock v. Hosmer*, 109 Ill. 245.

³ *Granger v. Warrington*, 3 Gilm. 299; *Watts v. Stoltz*, 28 Ill. App. 541.

⁴ *Hitt v. Allen*, 13 Ill. 592; *Tucker v. People*, 122 Ill. 583.

county, and the only causes for a change of venue apply to one or more but not all of the judges of such court, the case may be tried before some one of the judges of such court to whom the causes do not apply."¹

The question as to what is a "convenient county," within the meaning of the statute, is to be determined by the presiding judge in the exercise of his discretion.²

The case may be sent from the circuit to the county court.³

Docketing cause.—"The clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted to him, and docket the cause, and such cause shall be proceeded in and determined in all things, as well before as after judgment, as if it had originated in such court."⁴

Irregularities waived.—"All questions concerning the regularity of the proceedings in a change of venue, and the right of the court to which the change is made to try the cause and execute the judgment, shall be considered as waived after trial and verdict."⁵

Where a change of venue is improperly granted, the proper practice for the party complaining is to move to remand the cause to the county from which it was sent, and if his motion is overruled take an exception and embody the motion and ruling of the court in a bill of exceptions.⁶

Criminal cases.—For proceedings for a change of venue in criminal cases, see Rev. Stat. 1895, p. 1572, and 2 Starr & Curtis' An. Stat. 2454-8; also cases cited below.⁷

¹ 2 Starr & Curtis, 2454-5; Rev. Stat. (1893), 1469; Rev. Stat. (1895), 1571; see *Lowrey v. Coster*, 91 Ill. 182; *R. R. Co. v. Perkins*, 125 Ill. 127.

² *Stringam v. Parker*, 159 Ill. 304.

³ *McGrath v. Miller*, 61 Ill. App. 497; see *Mix v. People*, 122 Ill. 641.

⁴ Rev. Stat. (1895), 1572; *Ins. Co. v. Nelson*, 75 Ill. 548.

⁵ *Ib.*; *Gardner v. People*, 3 Scam. 83; *Brennan v. People*, 15 Ill. 511; *Johnson v. Von Kettler*, 66 Ill. 63; *Perteet v. People*, 70 Ill. 171; *Flagg v. Roberts*, 67 Ill. 485; *Noyes v. Kerns*, 94 Ill. 521.

⁶ *Johnson v. Von Kettler*, 66 Ill. 63.

⁷ *Perteet v. People*, 65 Ill. 230; *Rafferty v. People*, 66 Ill. 118; *Barrows v. People*, 11 Ill. 121; *Little v. Allington*, 93 Ill. 253; *Gray v. People*, 26 Ill. 344; *Smith v. People*, 36 Ill. 290; *McBane v. People*, 50 Ill. 503; *People v. McRoberts*, 100 Ill. 458; *Price v. People*, 131 Ill. 223; *Langford v. People*, 134 Ill. 444; *Hicham v. People*, 137 Ill. 75; *Cantwell v. People*, 138 Ill. 602; *Jamison v. People*, 145 Ill. 357.

To what judge.—When a change of venue is granted on account of the alleged prejudice of the presiding judge, it is proper practice to change the venue to another judge of the same circuit.¹

¹ *R. R. Co. v. Perkins*, 26 Ill. App. *Myers v. Walker*, 31 Ill. 353; *Ins.* 67; see *Curran v. Beach*, 20 Ill. 259; *Co. v. Mehlman*, 48 Ill. 313.

CHAPTER XXXII.

SUBMISSION TO JUDGE.

The act of 1887, entitled "An act to enable parties to avoid delay in the administration of justice," provides

"That any two or more persons or corporations may appear in person or by attorney in any circuit court (*or in the superior court of Cook county*), and submit to any judge thereof, orally, and without formal pleadings, any matter in controversy, having first entered into a written agreement (*to be entered of record*), and substantially in the following form, to wit:¹

No. 333. Agreement to submit controversies to a judge.

"In the — court of — county.

First. We (*here insert names*) do hereby mutually agree to submit to Judge (*here insert name*), of said court, certain matters in controversy between us for his determination, without a jury, he to hear the same forthwith and to enter the judgment or decree of the court therein within (*here insert number of days or "forthwith"*) days after such hearing is concluded.

Second. That said judgment or decree shall contain a statement as to what matters in controversy were so submitted, and such statement thereof shall be conclusive.

Third. That no record, except of this agreement and of such judgment or decree, shall be made as to the matters in controversy so submitted, or as to the proceedings had on the hearing thereof.

Fourth. That such judgment or decree may be enforced in like manner as other judgments and decrees of such court.

Fifth. That we each to the other hereby waive all right of appeal from such judgment or decree, and release all errors that may intervene in the hearing of the matter so submitted, and in the entering up of the judgment or decree therein, and agree that this release of errors may be pleaded in bar of any writ of error that may be sued out as to such judgment or decree.

Witness our hands and seals, this — day of —, A. D. 18—.

— [SEAL.]

— [SEAL.]"

¹ 3 Starr & Curtis' An. Stat. 1000; Rev. Stat. (1893) 1085; Rev. Stat. (1895) 1169.

“Such agreement shall be signed by the parties in person or by duly authorized attorney in fact, and when so executed shall be of binding force upon the parties thereto in all the courts of this state.

“It shall be the duty of such judge to proceed and in a summary manner to hear and determine the matters so submitted, and he shall enter a judgment or decree therein, within the time fixed in said agreement, which said judgment or decree shall be final and conclusive, and may be enforced in like manner as other judgments or decrees of such court, but no appeal shall be allowed therefrom.”

The provisions of section 1 of the statute requiring the agreement “to be entered of record,” are directory only, and not jurisdictional.¹

All matters which, under our system, are cognizable either at law or in equity, are susceptible of submission to the judge of the court for determination under this statute.²

¹ *Furwell v. Sturges*, 58 Ill. App. 462. ² *Ibid.*

CHAPTER XXXIII.

NEW TRIALS.

The practice of granting new trials is said to have begun in England in 1652.¹ At first they could be obtained only with the greatest difficulty, but in modern practice they are liberally granted in furtherance of justice. Where, however, the proceedings in a cause have been regularly and fairly conducted, courts will very reluctantly disturb a verdict and grant a new trial.²

The principal grounds for setting aside a verdict and granting a new trial, may be considered under the following heads:

1. **Misbehavior of the party prevailing.**—If a party is guilty of any improper conduct towards a witness, such as threatening or persuading him, or influencing him upon the stand, as by making signs how the witness shall answer, a new trial will be granted;³ or if the prevailing party, his agent or counsel, surreptitiously hands to the jury any paper not previously offered in evidence, being material to the point in issue;⁴ or if he or they directly approach the jury on the subject of the trial;⁵ or where indirect measures have been resorted to for the purpose of influencing the jury,⁶ or tricks practiced,⁷

¹ *Wood v. Gunston*, Styles' Rep. 462; *Williams v. Pratt*, 7 Eng. C. L. 293.

² *Wickersham v. People*, 1 Scam. 128; *Hust v. Conn*, 12 Ind. 257; *Powell v. Grimes*, 8 Ind. 252; see *Sullivan v. Dollins*, 13 Ill. 85; *Calhoun v. O'Neal*, 53 Ill. 354.³

³ *Amherst v. Hadley*, 1 Pick. 38; *Knight v. Freeport*, 13 Mass. 218.

⁴ *Lonsdale v. Brown*, 4 Wash. C. C. R. 148; *Whitney v. Whitman*, 5 Mass. 405; *People v. Carnal*, 1 Parker

C. R. 256; *Watson v. Walker*, 3 Foster 471.

⁵ *Blaine v. Chambers*, 1 S. & R. 169; *Ritchie v. Holbrook*, 7 S. & R. 458; *Claggage v. Swan*, 4 Binn. 150; *Knight v. Freeport*, 13 Mass. 218; *Thompson v. Mallett*, 2 Bay 94; *Cottle v. Cottle*, 6 Greenl. 140; *Martin v. Morelock*, 32 Ill. 485.

⁶ *Spencely v. DeWillott*, 7 East 108.

⁷ 11 Mod. 141; *Walker v. Walker*, 11 Geo. 203.

or disingenuous attempts made to suppress or stifle evidence, or thwart the proceedings, or obtain an unconscientious advantage, or mislead the court and jury, a new trial will be awarded.¹

If a party in whose favor a verdict is rendered, or his attorney, holds a conversation with any of the jurors, about the case, after it has been submitted and before the verdict is delivered, it will be a ground for a new trial.²

2. Mistakes and misconduct of the jury, etc.—Where the jurors determine their verdict by casting lots, a new trial will be granted;³ but where each juror named a sum, and the whole, being added together, was divided by twelve, and the quotient was taken for the verdict, a new trial was refused.⁴

Where a juror had formed and expressed a decided opinion upon the merits of the case, adverse to the defendant, and that fact was not known to the latter or his counsel, who exercised proper diligence by asking the juror, before he was sworn, whether he had formed and expressed an opinion—it was held that the defendant was entitled to a new trial.⁵

If the jurors act in disregard of their oath,⁶ drink spirituous liquors after being charged with the cause⁷ or resort to artifice to get rid of their confinement,⁸ or commit other acts of that sort, it will avoid a verdict.⁹ But misconduct on the

¹ Grah. New Trials 56; 4 Chit. Pr. 59.

² *Martin v. Morelock*, 32 Ill. 485; see *Bonnet v. Glattfeldt*, 120 Ill. 166; *Bevelot v. Lestrade*, 153 Ill. 625.

³ *Voize v. Deval*, 1 Term 11; *St. John v. Abbott*, Barnes 441; *Smith v. Cheetham*, 3 Caines 57; *Comm. v. Roby*, 12 Pick. 496; *Manix v. Maloney*, 7 Clarke (Iowa) 81; *Schanler v. Porter*, 7 Clarke (Iowa) 482; *Grinnell v. Phillips*, 1 Mass. 530; *R. R. Co. v. Birkett*, 62 Ill. 332.

⁴ *Grinnell v. Phillips*, 1 Mass. 530; *Brooke v. White*, 1 Bos. & P.; see *Reed v. Thompson*, 88 Ill. 245; *Cummins v. Crawford*, 88 Ill. 312; *Claggage v. Swan*, 4 Binn. 150.

⁵ *Vennum v. Harwood*, 1 Gilm. 659; *Sellers v. People*, 3 Scam. 412; see *Jeffries v. Randall*, 14 Mass. 205; *People v. Fries*, 3 Dall. 515; *People v. Plummer*, 9 Cal. 298.

⁶ *Cro. Eliz.* 778; *Martin v. State*, 25 Geo. 494; *State v. Shelledy*, 8 Clark (Iowa) 477; see *R. R. Co. v. Swearengen*, 47 Ill. 206.

⁷ *People v. Douglass*, 4 Cow. 26; *Brant v. Fowler*, 7 Cow. 562; *Com. v. Roby*, 12 Pick. 496; see *Wilson v. Abrahams*, 1 Hill (N. Y.) 207.

⁸ *Oliver v. Trustees*, 5 Cow. 283.

⁹ *Bumb.* 35; *St. John v. Abbott* Barnes, 438; 1 Str. 462; 1 Bl. 1299; *Comb.* 357; 4 Chit. Pr. 48.

part of the jurors is not, in all cases, a sufficient ground for setting aside a verdict; and although their misconduct may subject them to punishment, yet if there does not appear to have been any abuse, the verdict will not be disturbed.¹

If an officer, having charge of a jury, permits any member of it to drink spirituous liquors after he is sworn, but before the case is submitted, the officer may be punished for it, but the verdict will not be vitiated.² The affidavits of jurors themselves will never be received, to prove any impropriety or misconduct on their part, relating to the trial or verdict.³

3. Verdict against law and evidence.—A new trial will be granted where the verdict of the jury is contrary to the law,⁴ or manifestly against the evidence.⁵ But unless the verdict is clearly against the evidence, a new trial will not be granted;⁶ especially where two juries have determined the

¹ *Smith v. Thompson*, 1 Cow. 221, note; see *Adams v. People*, 47 Ill. 376; *Jewsbury v. Sperry*, 85 Ill. 56.

² *Davis v. People*, 19 Ill. 74; see *Reins v. People*, 30 Ill. 256; *Adams v. People*, 47 Ill. 376.

³ *Martin v. Ehrenfels*, 24 Ill. 187; *Bishop v. State*, 9 Geo. 121; *Boston v. Dana*, 1 Gray 83; *People v. Carmal*, 1 Parker C. R. 255; *Folsom v. Brawn*, 5 Foster 114; *Burns v. Pain*, 8 Texas 159; *Clark v. Carter*, 12 Geo. 500; *U. S. v. Reid*, 12 How. (U. S.), 361; *Dana v. Tucker*, 4 Johns. 487; *Sergant v. Denniston*, 5 Cow. 106; *Voize v. Deleval*, 1 Term 11; *Grinnell v. Phillips*, 1 Mass. 542; *Coleman v. State*, 28 Geo. 78; *Brown v. State*, 28 Geo. 199; *Reins v. People*, 30 Ill. 256; *Allison v. People*, 45 Ill. 37; but see *Sawger v. Stephenson*, Breese 24; *Reed v. Thompson*, 88 Ill. 245; *Niccolls v. Foster*, 89 Ill. 386.

⁴ *Cunningham v. Magoun*, 18 Pick. 13; *Tyler v. Gray*, 9 Geo. 408; *Drake v.*

Surget, 36 Miss. 458; *Higgins v. Lee* 16 Ill. 495; *R. R. Co. v. Swearengen*. 47 Ill. 206; *McDavid v. Blevins*, 85 Ill. 238.

⁵ *Tilley v. Spaulding*, 44 Ill. 80; *Bush v. Kindred*, 5 Mass. 353; *Wait v. McNeil*, 7 Mass. 261; *Curtis v. Jackson*, 13 Mass. 507; *Lucas v. Parsons*, 27 Geo. 593; *Clements v. Little*, 28 Geo. 491; *Mississippi v. Cross*, 20 Ark. 443; *Young v. Wilson*, 24 Miss. 694; *Easterling v. Power*, 12 Cal. 88; see *City v. French*, 55 Ill. 317; *Coal Co. v. Lamprecht*, 51 Ill. App. 649.

⁶ *Bush v. Kindred*, 5 Mass. 353; *Coffin v. Ins. Co.*, 15 Pick. 291; *Howell v. Ins. Co.*, 7 Ohio 276; *Hendry v. Smith*, 28 Geo. 308; *Tallahassee v. Macon*, 8 Flor. 299; *Holden v. Bloxum*, 35 Miss. 381; *Montgomery v. Culton*, 23 Texas 156; *Weddle v. Stark*, 10 Cal. 301; *R. R. Co. v. Jee*, 87 Ill. 454; *Bell v. Gordon*, 86 Ill. 501.

same way;¹ or where a former jury could not agree;² or where the verdict is against the party having the burden of proof.³ A new trial can only be granted in extraordinary cases, where it is manifest that the jurors have mistaken or abused their trust;⁴ or where the verdict is clearly against the weight of evidence.⁵ It will not be granted because there is an entire absence of direct proof, and presumptions alone are relied on to establish the necessary facts.⁶

Where the evidence is conflicting, and that produced by either party, considered alone, is sufficient to require a verdict in his favor, a new trial will not be granted on the ground that the verdict is not sustained by the evidence.⁷

4. **Excessive or inadequate damages.**—New trials may be granted for excessive or inadequate damages, where there are fixed rules and principles whence it may be known that there is an error in the verdict; as in actions on contracts, or for torts done to property, the value of which may be ascertained.⁸ And whenever the court is satisfied that there is no reasonable proportion between the injury and the compensation, it is its duty to grant a new trial.⁹ The damages, however, must be clearly excessive or inadequate, and such as everybody would cry out against, and not merely a sum larger

¹ *Barrett v. Rogers*, 7 Mass. 297; *Cunningham v. Magoun*, 18 Pick. 13; *Ramsey v. Hamilton*, 14 Miss. 358.

² *Baker v. Briggs*, 8 Pick. 122; *Rozar v. Burns*, 13 Geo. 34.

³ *Cunningham v. Magoun*, 18 Pick. 13.

⁴ *Baker v. Briggs*, 8 Pick. 122; see *Webster v. Vickers*, 2 Scam. 296; *Eldridge v. Huntington*, 2 Scam. 538. *Dexter v. Cole*, 6 Wis. 319; *R. R. Co. v. Swearengen*, 47 Ill. 206.

⁵ *Miller v. Baker*, 20 Pick. 289; *Coffin v. Ins. Co.*, 15 Pick. 291; *Schwab v. Gingerick*, 13 Ill. 697; *White v. Clayes*, 32 Ill. 325; *R. R. Co. v. Hutchins*, 34 Ill. 108.

⁶ *Blanchard v. Coulburn*, 16 Mass. 345; *Rogers v. King*, 12 Geo. 229.

⁷ *Stickler v. Otto*, 86 Ill. 161; *Hayes v. Houston*, 86 Ill. 487; *Addams v. Suver*, 89 Ill. 482; *Howitt v. Estelle*, 92 Ill. 218; *Lewis v. Lewis*, 92 Ill. 237; *Sugar Co. v. Frazier*, 26 Ill. App. 60.

⁸ *Comm. v. Norfolk*, 5 Mass. 435; *Barnard v. Poor*, 21 Pick. 378; *Winchester v. Grosvenor*, 44 Ill. 425; see *Beveridge v. Welch*, 7 Wis. 465.

⁹ *Sampson v. Smith*, 15 Mass. 365; *Stevenson v. Belnap*, 6 Clark (Iowa) 97; *Lehman v. City*, 29 Barb. 234; see *Ry. Co. v. Jackson*, 55 Ill. 492; *Ry. Co. v. Hughes*, 87 Ill. 94; *Ry. Co. v. Payzant*, 87 Ill. 125; *Hennies v. Vogel*, 87 Ill. 242; *Kolb v. O'Brien*, 86 Ill. 210; *Ry. Co. v. Dewin*, 86 Ill. 296.

or smaller than the judge who presided at the trial would have given.¹

Where it is apparent the jury were actuated by passion and prejudice, or some motive other than a desire to do justice between the parties, the verdict, if excessive, will be set aside.²

Where there is a motion for a new trial on the ground of excessive damages, the plaintiff may, if he chooses, remit a portion of the verdict to obviate the objection.³

Where the verdict gives grossly inadequate damages to the plaintiff, a new trial may be granted the plaintiff upon the same principle that like relief is granted to a defendant when excessive damages are assessed by the jury.⁴

5. Admitting improper, or refusing proper evidence.—If the court errs in admitting or refusing testimony, a new trial will be granted;⁵ but if the improper testimony is not objected to on the trial, and the whole evidence has been weighed by the jury, the court will not disturb the verdict.⁶

A verdict will not be set aside because evidence has been erroneously admitted, if such evidence is entirely unimportant,⁷ nor when a new trial must result in the same verdict.⁸ But the admission of incompetent or irrelevant testimony, calculated to make an impression on the minds of the jury, is a good

¹ *Pleydell v. Earle*, 7 Term. 529; *Shute v. Barrett*, 7 Pick. 82; *Jennings v. Loring*, 5 Ind. 250; *Clark v. Whitaker*, 19 Conn. 319; *Letton v. Young*, 2 Metc. (Ky.) 558; *Lucas v. Parsons*, 27 Geo. 593; *Ry. Co. v. Williams*, 55 Ill. 185; *City v. French*, 55 Ill. 318; *Elgin v. Renwick*, 86 Ill. 498.

² *Ry. Co. v. Barnett*, 56 Ill. App. 384.

³ *Ry. Co. v. Wrixon*, 150 Ill. 532, and cases there cited.

⁴ *Sutherland on Dam.* 815-816; *Carr v. Miner*, 42 Ill. 179; *James v. Morey*, 44 Ill. 352; *Hackett v. Pratt*, 52 Ill. App. 346.

⁵ *Hunt v. Adams*, 7 Mass. 518; *Mercer v. Sayre*, 7 Johns. 306; *Santillan v. Moses*, 1 Cal. 92; *Roundy v.*

Hunt, 24 Ill. 597; *Smith v. Gillett*, 50 Ill. 290.

⁶ *Harris v. Doe*, 4 Blackf. 369; see *Gillham v. Bank*, 2 Scam. 245.

⁷ *Turnpike Co. v. Berry*, 5 Ind. 286; *State v. Lawson*, 14 Ark. 114; *School v. Bragdon*, 3 Foster 507; *Bird v. State*, 14 Geo. 43; *Santillan v. Moses*, 1 Cal. 92; *Litchfield v. Londonderry*, 39 N. H. 247; *Drake v. Surget*, 36 Miss. 458; *Dodge v. Greeley*, 31 Me. 343; *Mattingly v. Crowley*, 42 Ill. 300; see *Rowley v. Hughes*, 40 Ill. 316; *McKichan v. McBean*, 45 Ill. 228; *City v. Patterson*, 50 Ill. 61.

⁸ *Marshall v. Morris*, 16 Geo. 368; *Cogan v. Frisby*, 36 Miss. 178; *Lynes v. State*, 36 Miss. 617; see *Mattingly v. Crowley*, 42 Ill. 300; *Machine Co. v. Rosine*, 87 Ill. 105.

ground for a new trial; for it is impossible to say what influence such testimony may have exerted.¹

The refusal to admit proper evidence is not a ground for setting aside the verdict, if the excepting party was not thereby injured. Where the deposition of a witness was erroneously rejected, and the party afterward procured the attendance and testimony of the witness at the trial, it was held that the rejection of the deposition was not a ground for a new trial.²

6. Error in the charge to the jury.—Error of the court in improperly charging or refusing to charge the jury, is a ground for a new trial. The following observations under this head refer to the statutory provisions and the adjudications and practice in Illinois, respecting instructions to the jury.

It is provided by the statute that the court, in charging the jury, shall instruct only as to the law of the case; and all instructions must be in writing.³ It is usual for the counsel to prepare the instructions, and submit them to the judge; and the statute requires the judge to write on the margin of such as he approves, the word “given,” and on the margin of such as he can not give the word “refused.” After instructions are given, he may not qualify, modify, or in any manner explain them, otherwise than in writing;⁴ but he is not prohibited from giving, of his own accord, any written instructions applicable to the case.⁵

Where the parties agree to a trial by the court, without a jury, “upon such trial either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which

¹ *Dresser v. Ainsworth*, 9 Barb. 619; *Boyle v. Coleman*, 13 Barb. 42; *Thurmond v. Trammall*, 22 Texas 257.

² *Clough v. Bowman*, 15 N. H. 504. see *Bull v. Griswold*, 19 Ill. 631.

³ 2 Starr & Curtis 1814; Rev. Stat. (1893), 1077; Rev. Stat. (1895), 1161; *R. R. Co. v. Hammer*, 85 Ill. 526; *Abingdon v. Meadows*, 28 Ill. App. 442.

⁴ Rev. Stat. (1895), 1162; Rev. Stat.

(1893), 1078; 2 Starr & Curtis 1815; *Ray v. Wooters*, 19 Ill. 82; see *Bloomer v. Therrill*, 11 Ill. 483; *Mayer v. Meod*, 83 Ill. 19; *Reinback v. Crabtree*, 77 Ill. 182; *Ryan v. Donnelly*, 71 Ill. 100; *Packet Co. v. Binninger*, 70 Ill. 571; *Clapp v. Martin*, 33 Ill. App. 439.

⁵ *Brown v. People*, 4 Gilm. 439; *R. R. Co. v. Jacobs*, 20 Ill. 478; *Stumps v. Kelley*, 22 Ill. 140; *Ins. Co. v. Pulver*, 126 Ill. 332; *Aneals v. People*, 134 Ill. 416.

the court shall write 'refused' or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court."¹

See *Propositions of Law*, Chapter 37, *post*.

Instructions must be based on the evidence, and applicable to the case, and not contain mere abstract propositions.² They should be concise, briefly presenting the points of law on which the party relies, and not argumentative;³ and they ought to be as few and simple as possible, as otherwise they are likely to mislead the jury.⁴

Instructions should present the law of the case, leaving the facts to the jury, and not assume facts to have been proved.⁵

If instructions given were calculated to mislead, and must have misled the jury, it is ground for a new trial, or a reversal of the judgment.⁶

When two instructions are asked, both containing the same principle of law, the court may give the one and refuse the other.⁷

¹ Rev. Stat. (1893), 1076; Rev. Stat. (1895), 1160; 2 Starr & Curtis 1808; *Kepperly v. Ramsden*, 83 Ill. 354; *McKinzie v. Remington*, 79 Ill. 338.

² See *Humphreys v. Collier*, 1 Scam. 47; *Hamilton v. Hunt*, 14 Ill. 472; *Coughlin v. People*, 18 Ill. 266; *Riley v. Dickens*, 19 Ill. 29; *R. R. Co. v. George*, 19 Ill. 510; *Hosley v. Brooks*, 20 Ill. 115; *County v. Buck*, 27 Ill. 440; *Harris v. Miner*, 28 Ill. 135; *Pfund v. Zimmerman*, 29 Ill. 269; *Hessing v. McCloskey*, 37 Ill. 341; *R. R. Co. v. McKee*, 43 Ill. 119; *Kennedy v. People*, 44 Ill. 283; *Harnit v. Thompson*, 46 Ill. 460; *Bullock v. Marrott*, 49 Ill. 62; *Chapman v. Caurey*, 50 Ill. 512; *Collins v. Waters*, 54 Ill. 485; *Wray v. R. R. Co.*, 86 Ill. 424.

³ *Merritt v. Merritt*, 20 Ill. 65; see *Cushman v. Cogswell*, 86 Ill. 62; *Ins. Co. v. Nelson*, 75 Ill. 548.

⁴ *Cemetery Ass'n v. Smith*, 24 Ill. 480; *Newkirk v. Cone*, 18 Ill. 449; see

Higgins v. Lee, 16 Ill. 497; *Ins. Co. v. Crawford*, 89 Ill. 62; *Moshier v. Kitchell*, 87 Ill. 18.

⁵ See *Sherman v. Dutch*, 16 Ill. 283; *Wall v. Goodenough*, 16 Ill. 415; *Gehr v. Hagerman*, 26 Ill. 438; *Conkwright v. People*, 35 Ill. 204; *Winne v. Hammond*, 37 Ill. 99; *Hawk v. Ridgway*, 33 Ill. 473; *Sinclair v. Berndt*, 87 Ill. 174.

⁶ *Brown v. Graham*, 24 Ill. 628; see *Gibson v. Webster*, 44 Ill. 483; *Bullock v. Marrott*, 49 Ill. 62; *Collins v. Waters*, 54 Ill. 485; *Orr v. Jason*, 1 Bradw. 439; *Sinnet v. Bowman*, 151 Ill. 156.

⁷ *May v. Tallman*, 20 Ill. 443; *Curtiss v. Martin*, 20 Ill. 557; *Montag v. Linn*, 23 Ill. 551; *College v. McIntosh*, 37 Miss. 671; see *Hessing v. McCloskey*, 37 Ill. 341; *Bowen v. Schuler*, 41 Ill. 192; *Halty v. Markel*, 44 Ill. 225; *McKichan v. McBean*, 45 Ill. 228; *Underwood v. White*, 45 Ill. 437; *Ware v. Gilmore*, 49 Ill. 278; *Free-*

If substantial justice has been done, even though improper instructions have been given, or proper instructions refused, the verdict will not be set aside.¹ And although a verdict may be clearly wrong, yet if another instruction, on behalf of the same party, puts the case fairly before the jury, the finding will not be disturbed.²

7. Newly discovered evidence.—In order to support a motion for a new trial upon the ground of newly discovered evidence, it ought to be made to appear that the testimony has been discovered since the trial, or that no *laches* is imputable to the party, and that the testimony is material. If the party knew of the existence of the testimony, and could not procure it in time, he ought to have applied for a postponement of the trial.³

A new trial will not in general be granted for the purpose of introducing newly discovered evidence, merely cumulative in its character, and not conclusive,⁴ or which would only be

man v. Tinsley, 50 Ill. 497; *Calhoun v. O'Neal*, 53 Ill. 354; *Franks v. Welch*, 89 Ill. 38; *Scott v. Delany*, 87 Ill. 146; *Keeler v. Stuppe*, 86 Ill. 309; *Holcomb v. People*, 79 Ill. 409; *Chicago v. Hessing*, 83 Ill. 204; *Ins. Co. v. Jackson*, 83 Ill. 302.

¹ *Newkirk v. Cone*, 18 Ill. 449; *Dishon v. Schorr*, 19 Ill. 59; *Elam v. Badger*, 23 Ill. 498; *Schwarz v. Schwarz*, 26 Ill. 81; *Warren v. Dickson*, 27 Ill. 115; *McConner v. Kibbe*, 33 Ill. 175; *Curtis v. Sage*, 35 Ill. 22; *Ins. Co. v. Frost*, 37 Ill. 333; *Daily v. Daily*, 64 Ill. 329; *Tuttle v. Robinson*, 78 Ill. 332; *Chicago v. Hessing*, 83 Ill. 204; *Bromley v. Goodwin*, 95 Ill. 118.

² *Warren v. Dickson*, 27 Ill. 115; *Elam v. Badger*, 23 Ill. 498; *R. R. Co. v. Swearingen*, 47 Ill. 206; see *Brown v. Graham*, 24 Ill. 628; *Mfg. Co. v. Ballou*, 71 Ill. 417; *Wallace v. People*, 159 Ill. 446.

³ *Mill Co. v. Gillen*, 100 Ill. 52; *R. R. Co. v. Sullivan*, 21 Ill. App. 580;

Classen v. Cuddigan, 21 Ill. App. 591; see *Crozier v. Cooper*, 14 Ill. 139; *Keenan v. People*, 104 Ill. 385; *Pipe Co. v. Johnson*, 44 Ill. App. 224; *Dyke v. DeYoung*, 133 Ill. 82.

⁴ *Morrison v. Stewart*, 24 Ill. 24; *Adams v. People*, 47 Ill. 376; *R. R. Co. v. Seitz*, 53 Ill. 452; *Harvey v. Collins*, 89 Ill. 255; *Abrahams v. Weller*, 87 Ill. 179; *Emory v. Addis*, 71 Ill. 273; *Fuller v. Little*, 69 Ill. 229; *Bell v. Gardner*, 77 Ill. 319; *Wright v. Gould*, 73 Ill. 56; *Champion v. Ullmer*, 70 Ill. 322; *Dyer v. People*, 84 Ill. 624; *Elgin v. Renwick*, 86 Ill. 498; *Klein v. People*, 113 Ill. 596; *Laird v. Warren*, 92 Ill. 204; *Friedberg v. People*, 102 Ill. 160; *Sahlinger v. People*, 102 Ill. 241; *Monroe v. Snow*, 131 Ill. 126; *Plumb v. Campbell*, 129 Ill. 101; *City v. Merrill*, 124 Ill. 522; *O'Neil v. O'Neil*, 123 Ill. 361; *Petefish v. Watkins*, 124 Ill. 384; *Burns v. People*, 126 Ill. 282; *Ry. Co. v. Clough*, 134 Ill. 586; *Langdon v. People*, 133 Ill. 388; *Spahn v.*

in mitigation of the damages;¹ nor for the purpose of impeaching the testimony given on the trial.² But cases may arise that may require a relaxation of the latter rule to prevent a palpable wrong,³ and if the new evidence goes to impeach the whole of the opposite party's case, by the imputation of fraud, a new trial will sometimes be granted—as where payment was sworn to upon the trial by two witnesses, who, there was strong reason to believe, had been tampered with.⁴ Where the newly discovered evidence is not cumulative in regard to the particular point to which it relates, and its importance could not have been foreseen, and it strengthens the conviction that justice has not been done, a new trial may be granted.⁵

A new trial may be awarded to enable a defendant to prove an *alibi*, but this will be done with great caution.⁶

The affidavit in support of an application for a new trial on the ground of newly discovered evidence, must fully set forth such evidence,⁷ and must show that it has been discovered since the trial; that it is material to the issue; that it is true; that it is not cumulative; that it does not go to impeach the character of a witness; and that it could not have been produced on the trial by the use of due diligence.⁸ And the application should be supported by the affidavit of the witness by whom it is proposed to prove the matters relied on, or some excuse should be shown for not producing such affidavit.⁹

8. Absence or mistakes of witnesses.—A new trial will

People, 137 Ill. 538; *Lilly v. People*, 148 Ill. 467.

¹ *Schlenker v. Risley*, 3 Scam. 483.

² *Ricquet v. McKay*, 2 Blackf. 465; *Bland v. State*, 2 Blackf. 608; *McIntire v. Young*, 6 Blackf. 496; *Martin v. Ehrenfels*, 24 Ill. 187; see *O'Reilly v. Fitzgerald*, 40 Ill. 310; *Besse v. Sawyer*, 28 Ill. App. 248; *Monroe v. Snow*, 131 Ill. 126.

³ *Cochran v. Ammon*, 16 Ill. 316; *Levinings v. State*, 13 Geo. 513; *Ham v. Ham*, 39 Me. 263; *Gardner v. Gardner*, 2 Gray 434; *Dyer v. People*, 84 Ill. 624.

⁴ *Peterson v. Barry*, 4 Binn. 481; *Bixby v. State*, 15 Ark. 395.

⁵ *Wilder v. Greenlee*, 49 Ill. 253; *Schweyer v. Anstett*, 2 Bradw. 335.

⁶ *Wilson v. People*, 26 Ill. 434.

⁷ *Perry v. Cochran*, 1 Cal. 180.

⁸ *Crozier v. Cooper*, 14 Ill. 139; see *Ritchie v. West*, 23 Ill. 385; *Murphy v. McGrath*, 79 Ill. 594; *Chapman v. Chapman*, 129 Ill. 386; *Booth v. Tabernor*, 23 Ill. App. 173.

⁹ *Cowan v. Smith*, 35 Ill. 416; *Emory v. Addis*, 71 Ill. 273; *Altholtz v. Durfee*, 25 Ill. App. 43.

sometimes be granted on account of the unavoidable absence of witnesses.¹ But it must be where the party was so situated that a continuance could not be had; for if a party, knowing his witnesses to be absent, chooses to risk a trial without their testimony, he ought to abide by the result;² and a new trial is never granted where the party has been guilty of neglect in not coming prepared with evidence which he knew to exist, and might have produced at the trial, or in not going into the examination of the evidence.³ But if the attendance of a material witness on one side is prevented by the fraud or misconduct of the other party, a new trial will be granted.⁴

A want of recollection of a fact by a party, which by due attention might have been remembered, is not a ground for granting a new trial.⁵ So, it is said, if a witness has, from want of attention or from not being prepared, made a mistake in giving his evidence, a new trial will not be granted, because this would be extremely dangerous in its consequences.⁶ But in other cases this rule is denied, and it is laid down that if a party is nonsuited by the mistake of a witness in a material part of his testimony, a new trial ought to be granted.⁷ A motion for a new trial on account of the absence of a material witness should be supported by the affidavit of the witness, or some excuse should be shown for not producing it.⁸ If the testimony of witnesses, which occasioned a verdict, was founded upon, or derived credit from, particular circumstances, and those circumstances are afterwards clearly shown not to have existed, a new trial will be granted.⁹

9. **Surprise.**—Where a party has been vigilant in prepar-

¹ *Bond v. Cutter*, 7 Mass. 205; *Smith v. Chapel*, 36 Minn. 180; *Smith v. State*, 58 Iowa 487; *Servis v. Cooper*, 33 N. J. L. 68.

² *Wits v. Polehampton*, 2 Salk. 645.

³ *Mosser v. Sayre*, 7 Johns. 306.

⁴ *Wilkinson v. Payne*, 2 Salk. 647; *Stra.* 691; 1 Wils. 98; *Gist v. Mason*, 1 T. R. 84; *Vernon v. Hankey*, 2 T. R. 113; *Casey v. King*, 5 Geo. 75; *Crafts v. Ins. Co.*, 36 N. H. 44.

⁵ *Bond v. Cutter*, 7 Mass. 205.

⁶ *Steinbach v. Ins. Co.*, 2 Caine 129; *Say.* 27; *O'Kelly v. Felker*, 71 Ga. 771.

⁷ 2 Anst. 517; *Say.* 28; *Hewlett v. Churchley*, 5 Taunt. 277; *Richardson v. Fisher*, 1 Bing. 145.

⁸ *Cowan v. Smith*, 35 Ill. 416.

⁹ *Lister v. Mundell*, 1 Bos. & Pul. 427.

ing for trial, using every reasonable precaution, and is taken by surprise by the introduction of evidence which he could not reasonably have anticipated, and which he can overcome on another trial, such evidence contributing to an unfavorable verdict, he will be entitled to a new trial.¹ The surprise must be in an essential matter, and produce injury, and must not be the consequence of the party's own neglect or inattention; and all reasonable efforts must be made to overcome the evidence which works the surprise.²

Death of trial judge.—When the judge before whom the cause was tried dies after verdict and pending or before the determination of a motion for a new trial, the succeeding judge has power to decide the motion and grant or overrule the same, and enter such judgment or order as shall to justice appertain.³

Improper remarks of counsel.—Remarks of counsel in arguments to the jury are not, as a general rule, sufficient cause to set aside the verdict, unless they are of such an inflammatory nature as to prejudice the minds of the jury.⁴ But where a jury is improperly influenced by remarks, allusions, or comments outside of the evidence, made by counsel during the progress or the argument of a cause on trial, the verdict should be set aside.

Counsel should confine their discussion to the evidence in the particular case, and avoid intemperate and extravagant statements of matters not pertinent and which are calculated to arouse the prejudice and passion of jurors and lead to unjust results.⁵

¹ *Holbrook v. Nichol*, 36 Ill. 162.
Parks v. Nichols, 20 Ill. App. 143.

² *R. R. Co. v. Vosburgh*, 45 Ill. 311;
Thompson v. Anthony, 48 Ill. 468;
R. R. Co. v. Rose, 72 Ill. 183; *Slade*
v. McClure, 76 Ill. 319; *I. & W. Co.*
v. Badger, 30 Ill. App. 320; *W. C.*
Co. v. Lapp, 35 Ill. App. 374.

³ *People v. McConnell*, 155 Ill.
192, and cases there cited.

⁴ *R. R. Co. v. Long*, 52 Ill. App.
670; *Kennedy v. Sullivan*, 136 Ill.
94; see *Hennies v. Vogel*, 87 Ill. 244;

Hac'tett v. Smelsley, 77 Ill. 109;
Chase v. Chicago, 20 Bradw. 278;
Halloran v. Halloran, 137 Ill. 100;
Holloway v. Johnson, 28 Ill. App.
463; *Ry. Co. v. Barron*, 57 Ill. App.
469; *Ry. Co. v. Cullison*, 40 Ill. App.
67.

⁵ *R. R. Co. v. May*, 33 Ill. App.
366; *Freeman v. Dempsey*, 41 Ill.
App. 554; *R. R. Co. v. Johnson*, 116
Ill. 206; *Ry. Co. v. Annis*, 62 Ill.
App. 180.

Where the language of counsel tends to excite passion and prejudice to a degree that will probably cloud the judgment, and therefore improperly affect the verdict, the court should properly check and rebuke him; and for a failure in this respect, a verdict in favor of the party whose counsel thus abuses his position should be set aside. But it must not be assumed that every misstatement of law or fact will have the effect of exciting improper prejudice in the jury.¹

A court hearing counsel, under pretense of arguing a case, making statements of matters to the jury not in evidence, or pertinent as illustrative of matters in evidence, should promptly stop him, explain to the jury the impropriety of his language, and take such measures as are appropriate to prevent a repetition of such misconduct, and for a failure of duty in this respect manifestly affecting the result, the judgment should be reversed. In such case, the counsel whose client is unfavorably affected by such statements, should call the attention of the court to them at the time, lest the court might not otherwise have noticed the same.²

Statutory provisions in Illinois.—"Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict."

"If either party may wish to except to the verdict, or for other causes to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, or during the term it is entered,³ by himself or counsel, file the points in writing, particularly specifying the grounds of such motion; and final judgment shall thereupon be stayed until such motion can be heard by the court." (The *motion* should be made before judgment is rendered, although by the statute the "points" may be filed at any time during the term.)

Where a motion for a new trial is submitted without any statement in writing of the grounds therefor, without objec-

¹ *Henry v. R. R. Co.*, 121 Ill. 264;
Siebert v. People, 143 Ill. 571.

619; *Ry. Co. v. Wilson*, 56 Ill. App.
364.

² *R. R. Co. v. Fletcher*, 128 Ill.

³ *Campbell v. Conover*, 26 Ill. 64.

tions, such statement will be treated as waived, and the want of it can not be urged in the appellate court.¹

A verdict may not be set aside for irregularity only, unless cause is shown therefor during the term in which the verdict is rendered.

No more than two new trials of a cause may be granted to the same party, on the same grounds.²

In all cases where a new trial is granted on account of improper instructions given, or improper evidence admitted, or because the verdict is against the weight of the evidence, "or for any other cause not the fault of the party applying," it is to be without costs, and as of right.

Where a cause is tried by the court, without a jury, exception may be taken to any decision of the court, "whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and the evidence."³

New trial by agreement.—The granting of a new trial is a judicial function, and although both parties may be dissatisfied with the verdict and ask that it be set aside it is still for the court to determine whether or not a new trial shall be granted.⁴

Mode of applying for a new trial.—Application for a new trial is made by motion, which should be in writing; and in Illinois, as above mentioned, written specifications of the grounds of the motion are required to be filed. Such motion, and the reason therefor, may be framed as follows:

No. 384. Motion by defendant for new trial.

In the ——— Court.

—— Term, 18——.

C. D.)
ats. } *Assumpsit.*

A. B.) And now comes the defendant, by his attorney aforesaid, and

¹ *R. R. Co. v. McNath*, 91 Ill. 104; *May v. May*, 36 Ill. App. 77; *Bromley v. People*, 150 Ill. 297.

² Rev. Stat. (1893) 1078; Rev. Stat. (1895) 1162; 2 Starr & Curtis 1818; see *Silsbee v. Lucas*, 53 Ill. 479; *De Soto v. Buckles*, 40 Ill. App. 86.

³ 2 Starr & Curtis 1826; Rev. Stat. (1893) 1079; Rev. Stat. (1895) 1163.

⁴ *Smedley v. Ry. Co.*, 45 Ill. App. 426; *City v. McEniry*, 39 Ill. App. 218; *Aiken v. Bruen*, 21 Ind. 137; *Phelan v. Rutz*, 15 Cal. 90; *Nichols v. Ry. Co.*, 10 Bosw. (N. Y.) 260.

moves the court to set aside the verdict rendered, and to grant a new trial in this cause.

And for grounds of his motion the defendant shows to the court the following, to wit :

1. The court admitted, on the trial, improper evidence on the part of the plaintiff, that is to say (*here specify such evidence.*)

2. The court refused to admit proper evidence offered by the defendant, that is to say (*here specify the evidence.*)

3. The court improperly gave to the jury the *second, fourth and fifth* instructions asked by the plaintiff.

4. The court improperly refused to give the *third, sixth and seventh* instructions offered by the defendant.

5. The verdict is contrary to the law and the evidence in the case.

(*Any other grounds may be specified in like manner.*)

G. H., Attorney for Defendant.

A motion for a new trial should be made before a motion in arrest of judgment, as the latter is, strictly speaking, a waiver of the former.¹

Where the cause is tried by the court, without a jury, it is not necessary that a motion for a new trial should be made, in order that the evidence in the cause may be reviewed in the supreme court.²

Setting aside default and granting new trial.—The law intends that every one shall have a fair trial; and if a party, by misfortune or accident, without any fault on his part, has been unable to present his defense before a default is taken, the court will, on a proper case shown by affidavit, set aside the default, and grant a hearing on the merits, on such terms as the justice of the case may require. The terms usually imposed in such case are the payment of costs.³

The statute of Illinois⁴ provides that “the court may, in its discretion, before final judgment, set aside any default upon good and sufficient cause, upon affidavit, upon such terms and conditions as shall be deemed reasonable.”

An application to set aside a default is addressed to the

¹ *Hall v. Nees*, 27 Ill. 411; see *Parr v. Van Horne*, 40 Ill. 122; *Board of Ed. v. Hoag*, 21 Ill. App. 588.

² *Mahoney v. Davis*, 44 Ill. 288; *Sands v. Wacaser*, 149 Ill. 530; *Sands v. Kagy*, 150 Ill. 109.

³ *Yost v. Works*, 41 Ill. App. 556; *Burhans v. Village*, 138 Ill. 147.

⁴ Rev. Stat. (1893), 1076; Rev. Stat. (1895) 1160; 2 Starr & Curtis, 1805; *Harmison v. Clark*, 1 Scam. 181; *Gillett v. Stone*, 1 Scam. 539.

discretion of the court, and the decision thereon can not be assigned for error,¹ unless there has been a gross abuse of such discretion.²

The application must be made in apt time. It is too late to apply after a term of the court has intervened between the term at which the default was taken and that at which the motion is made, without showing a good reason for such delay.³

The party making application to have a default set aside must support it by an affidavit, showing that the default was taken without any fault or negligence on his part, and that there is merit in his defense, stating what such defense is, so that the court may see whether it is sufficient.⁴ The application should be made at the term at which the default is entered.⁵

The fact that counsel, whom the defendant supposed he had engaged to make his defense, failed to do so, does not make it imperative on the court to set aside a default entered against him, when there was time for him to have given his personal attention to his defense.⁶

The motion will not be granted at a subsequent term for

¹ *Garner v. Crenshaw*, 1 Scam. 143; *Harmison v. Clark*, 1 Scam. 131; *Wallace v. Jerome*, 1 Scam. 524; *Gillett v. Stone*, 1 Scam. 539; *Woodruff v. Tyler*, 5 Gilm. 457; *Mitchell v. Chicago*, 40 Ill. 174; *Bowman v. Wood*, 41 Ill. 203; see *Moir v. Hopkins*, 21 Ill. 557; *Fergus v. Mfg. Co.*, 71 Ill. 51; *R. R. Co. v. Mitchell*, 74 Ill. 394; *Leather Co. v. Woodley*, 75 Ill. 435; *Constantine v. Well*, 83 Ill. 192; *Hitchcock v. Herzer*, 90 Ill. 543; *Wheeler v. Alexander*, 30 Ill. App. 502; *Hall v. Bank*, 133 Ill. 234; *Kingsland v. Koeppe*, 137 Ill. 348; *Michael v. Mace*, 137 Ill. 494; *Wright v. Griffey*, 146 Ill. 394.

² *Greenleaf v. Roe*, 17 Ill. 474; see *Bowman v. Wood*, 41 Ill. 203; *Oetger v. Ross*, 36 Ill. 335; *Schroer v. Wes-*

sell, 89 Ill. 113; *Souerbry v. Fisher*, 62 Ill. 135.

³ *Ryder v. Twiss*, 3 Scam. 4; see *Messervy v. Beckwith*, 41 Ill. 452; *Hibbard v. Mueller*, 86 Ill. 256; *R. R. Co. v. Coss*, 73 Ill. 394.

⁴ *Rich v. Hathaway*, 18 Ill. 548; *Roberts v. Corby*, 86 Ill. 182; *Mendell v. Kimball*, 85 Ill. 582; *Edwards v. McKay*, 73 Ill. 570; *Mfg. Co. v. Thomas*, 17 Ill. App. 235; *Slack v. Casey*, 22 Ill. App. 412; *Schultz v. Meiselbar*, 144 Ill. 26.

⁵ *Messervy v. Beckwith*, 41 Ill. 452; *Scales v. Labar*, 51 Ill. 232; see *Cook v. Wood*, 24 Ill. 295; *Smith v. Wilson*, 26 Ill. 186.

⁶ *Schroer v. Wessell*, 89 Ill. 113; *Thielman v. Burg*, 73 Ill. 293; *Mendell v. Kimball*, 85 Ill. 582; *Schultz v. Meiselbar*, 144 Ill. 26.

any error of law apparent on the record.¹ The admission of counter affidavits upon a motion to set aside a default is improper.²

See *Judgment by Default*, page 821, *post*.

¹ *Schmidt v. Thomas*, 33 Ill. App. 109; *Knox v. Bank*, 57 Ill. 330.

Scrafield v. Sheeler, 18 Bradw. 507;

² *Mfg. Co. v. Thomas*, 17 Bradw. 235; *Wendell v. Kimball*, 85 Ill. 582;

Phillip v. Blagge, 3 Johns. 141; *Hanford v. McNair*, 2 Wend. 286; *City v. Edson*, 43 Ill. App. 417.

CHAPTER XXXIV.

EVIDENCE.

The mode of procuring the evidence that may be used in the trial of a cause, is a subject deserving attention in a work on practice. For this purpose, the various kinds of evidence may be considered under these three heads, viz.: *Documentary evidence*; *Oral testimony of witnesses*; and *Depositions*.

Documentary evidence.—If documents, such as statutes, public or private, records of any courts, judgments, etc., are required in the course of a trial, the party needing them must procure the originals, if necessary, at their place of deposit, or copies, when they are admissible, duly authenticated according to the laws of evidence in the various cases.

If deeds or other writings, or books of account, or private papers of any sort, are required, the party, if they are controlled by his adversary, must give him, his agent or attorney, written notice to produce them at the trial. There is no particular form of this notice; but a copy of it should be kept, attested to be a true one by the person who delivers the original. If the party who has an instrument required as evidence does not produce it, the other, upon proving service of the notice, will be permitted to prove the contents of the instrument by a copy, or other secondary evidence, in the same manner as if it had been destroyed or lost.¹ The notice should be served seasonably, in order to give the party reasonable time to produce the original.

If the instrument is produced, the party giving the notice to produce it may introduce it in evidence or not, as he may

¹ Starr & Curtis 1080; Rev. Stat. v. *Zemansky*, 9 Bradw. 479; *Morgan* (1893) 717; Rev. Stat. (1895) 765; v. *Corlies*, 81 Ill. 72; *Bank v. Ferris*, *Prettyman v. Walston*, 34 Ill. 190; 118 Ill. 465; *Pyncheon v. Day*, 18 *Bank v. Mansfield*, 48 Ill. 494; *Field* Bradw. 147.

choose.¹ But if introduced, its execution must be proved, in like manner as if no notice had been given, etc.² If, however, the party who produces the instrument under the notice is a party to it, and claims a beneficial interest under it, the party calling for the instrument need not prove its execution.³ And whether the party producing it, on notice, claims a beneficial interest under it or not, its genuineness need not be proved.⁴

Public records are not within the rule in regard to the production of paper evidence under the control of the opposite party. Courts have the power to compel the custodians of records and public documents to produce them; but where the exercise of this power is not necessary—as where certified copies could be obtained and used—a court may properly refuse to require the production of the originals.⁵ The record may be properly used instead of a copy when the case in which it is offered is being tried in the same court which made the record.⁶

The notice to the opposite party to produce a written instrument may be in the following form :

No. 385. Notice to produce written instrument on trial.

In the ——— Court.

A. B.)
vs. }
C. D.) *Covenant.*

To the above named *C. D. defendant* :

You will please produce, on the trial of this cause, a certain (*here describe the instrument with such particularity as to apprise the party of what is required.*) Otherwise the *plaintiff* will offer secondary evidence of the contents of the said instrument.

(*Date.*)

E. F., Attorney for *Plaintiff*.

Where notice was given the day before a trial, to produce a

¹ *Jordon v. Wilkins*, 2 Wash. 482.

² *Wetherston v. Edgington*, 2 Camp. 94; *Gordon v. Secretan*, 8 East 548.

³ *Pearce v. Hcooper*, 3 Taunt. 62; *Orr v. Marice*, 7 E. C. L. R. 382; *Betts v. Badger*, 12 Johns. 223;

Jackson v. Kingsley, 17 Johns. 158.

⁴ *McPherson v. Rathbone*, 7 Wend. 216.

⁵ *Seeley v. Wells*, 53 Ill. 120.

⁶ 1 Greenl. Ev., Sec. 502; *Gray v. Davis*, 27 Conn. 447; *Taylor v. Adams*, 115 Ill. 570.

paper which was eighty miles distant, in the hands of another person, it was held that the court could not take judicial notice that the paper could not have been obtained, and exclude secondary evidence.¹

If a person who is not a party to the cause has in his possession any written instrument, etc., which a party desires to use in evidence, a *subpœna duces tecum* should be served upon him, commanding him to bring with him and produce at the trial the instrument named. This *subpœna* may be framed from the common one, by adding the command to bring the required instrument.

Production of books and writings.—Sec. 9, Chap. 51, of the statute, provides that “the several courts shall have power in any action pending before them, upon motion and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue.”²

This section was designed to invest courts of law with more power than they had previously exercised in reference to the production of private writings and to furnish to a party litigant a speedy and summary mode by which to obtain written evidence which is in the possession and control of his adversary, and thus obviate the necessity of a bill of discovery seeking the same end. It contemplates the production of evidence on the trial of the cause, which the party applying therefor is entitled to introduce in support of his case, and which the other party withholds. A defendant is not required to disclose matters of evidence relied upon in the defense, and thus inform the plaintiff of his case further than the pleadings show. Matters purely of defense are the property rights of the defendant, which he may disclose or not, upon the trial.

Under the statute the court has power to compel the production of the books of a party, to be used in evidence on the trial by his adversary, upon proper showing that they contain entries tending to prove the issues; but the statute can not be construed as giving the court power and authority to take the

¹ *Cody v. Hough*, 20 Ill. 43; see *Bushnell v. Bishop*, 28 Ill. 204.

² Rev. Stat. (1893) 717; Rev. Stat. (1895) 765; 1 Starr & Curtis 1080.

books and papers of the party and impound them with an officer of the court for inspection or examination, out of the presence of the court. The statute does not give the right to compel the submission of the books of a party to general inspection or examination for "fishing" purposes, or with a view to find evidence to be used in other suits or prosecutions.

The power of courts to require the production of papers, etc., should be used with circumspection. The statute requires "good and sufficient cause shown" as a prerequisite. Such cause should be shown by affidavit particularly pointing out the necessity and propriety of the desired order of the court requiring the production of such books, etc., so that the court can see that the applicant is really in need of the same to enable him to fairly present his cause of action or his defense, and that the application is for no improper or ulterior purpose.¹

The court will not compel a party to submit for inspection his books of account with other persons not parties to the suit, when it is not made to appear that they contain evidence pertinent to the issue. Where a party is required to produce his books of account for inspection, he will have leave to seal up and conceal all such parts of them as, according to his affidavit, previously made and filed, do not relate to the matters in question.²

Books of account as evidence.—To admit books of account in evidence, the common law requires that the entries therein shall be proved by the clerk or servant who made them, if he be alive and can be produced; and it is necessary that the entries shall have been made in the ordinary course of business by a person whose duty it was to make them; and that they shall have been made contemporaneously with the delivery of the goods, so as to form a part of the *res gestae*.³

Besides the requirement that the entries should have been made in the usual and regular course of business, it is also necessary that the books should have been fairly and honestly kept.⁴

¹ *Lester v. People*, 150 Ill. 408; *Meeth v. Brick Co.*, 48 Ill. App. 602; see *Rigdon v. Conley*, 141 Ill. 565.

² *Pynchon v. Day*, 118 Ill. 9.

³ *House v. Beak*, 141 Ill. 290, and cases there cited; *Chisholm v. Beaman*, 160 Ill. 111.

⁴ *Ibid.*

The fact that a book of account contains some entries which are not original entries, forms no objection to receiving the book as evidence of other entries which are regularly made.¹

Section 3 of the act in regard to Evidence and Depositions, first passed in 1867, adds to and enlarges, but does not repeal, the common law rule for the admission of a party's books of account in evidence. This statute authorizes the party himself to testify to his own books, which was not allowed at common law. It was not the intention of the statute to prohibit the introduction in evidence of books of account kept by a clerk, when such clerk is living in the state and is able to testify to the correctness of the books. The statute merely permits an interested witness to testify to all the facts necessary to lay a foundation for the admission of the books of account.

The books of original entries kept by the clerk himself are admissible to sustain an account composed of many items, on proof that some of the articles were delivered at or about the time the entries purport to have been made; that the entries are in the handwriting of such party; that he kept no clerk at the time, and that persons having dealings with him have settled by such books and found them to be fair and correct.

Where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof (such as the transactions are reasonably susceptible of) from other sources shall be produced.²

The rule seems to be well settled, that account books of a party are inadmissible to prove any matter collateral to the issue of debt and credit between the parties.³

Where a complainant introduces in evidence the books of another for the purpose of charging his estate, the former is

¹ *Chisholm v. Beaman*, 160 Ill. 111.

² *House v. Beak*, 141 Ill. 290; *Chisholm v. Beaman*, 160 Ill. 111.

³ *Batchelder v. Sanborn*, 22 N. H. 25; *Gage v. McIlwain*, 1 Strobh. 135; *Lonergan v. Whitehead*, 10

Watts. 240; *Winsor v. Dillaway*, 4 Met. (Mass.) 221; *Bustin v. Rogers*, 11 Cush. 346; *Jones v. Brick*, 3 Halstead 332; *Tenbroke v. Johnson*, Coxe (N. J.) 334; *Palmer v. Goldsmith*, 15 Ill. App. 544.

bound to admit those items or entries which make against him as well as those which operate in his favor, unless he can show that the items to his prejudice have been improperly inserted.¹

It is true of books of account, as of all other documents in writing, that they furnish the best evidence of what they contain, but it is also true that where books of account are voluminous and intricate, resort to the aid of an expert bookkeeper to explain the meaning of entries and the true state of accounts to a jury, or a court, may frequently be had.²

It has been held that a plaintiff who has made the proper preliminary proof by his own testimony only, may produce his books of account in evidence in an action against the administratrix of the debtor.³

Oral testimony of witnesses.—The attendance of witnesses at a trial is compelled by a *subpœna*, which is a judicial writ, directed to the witnesses, commanding them to appear before the court at the time therein specified, to give their evidence in the cause named in the writ. In Illinois the writ is generally directed to the sheriff. It is usual for the party desiring the attendance of witnesses to file with the clerk of the court a *præcipe*, which may be in the following form:

No. 336.

In the ——— Court.

A. B. }	} <i>Assumpsit.</i>	The clerk of the said court will issue a <i>subpœna</i> for J. K. and L. M., as witnesses for the <i>plaintiff</i> , in this cause, to appear on, etc.; and direct the same to the sheriff of the county of ——— to execute.
vs. C. D. }		

(Date.) E. F., Attorney for Plaintiff.

There is no time limited within which a *subpœna* must be served. It ought, of course, be served so as to give the witnesses a reasonable time to come to the place specified, if they

¹ *Howell v. Moores*, 127 Ill. 67, and cases there cited.

² 1 Greenl. Evid., Sec. 93; *Hollingworth v. State*, 111 Ind. 289; Am. & Eng. Ency. of Law, Art. 71, p. 88; Underhill on Evid., Sec. 38 (1894);

Culver v. Marks, 123 Ind. 554; *Burton v. Driggs*, 20 Wall. 125; *Guarantee Co. v. Loan Ass'n*, 57 Ill. App. 254.

³ *Alling v. Brazee*, 27 Ill. App. 595.

reside at a distance; but when they are at hand, the *subpœna* may be served even after the trial has commenced.

If the witnesses reside in another county than that where the court is held, their fees for travel and attendance must be paid or tendered to them, on service of the *subpœna*, or they can not be proceeded against for not appearing.¹

If a witness who has been regularly summoned (and whose fees have been tendered to him, where required) neglects or refuses to attend and testify, as commanded by the writ, the court will, on motion, order an attachment to be issued against him for contempt, and impose such fine upon him as the court may deem just and proper, and order him to pay the costs of such attachment; and such witness is further liable to the action of the aggrieved party, for all damages by him sustained by the default. If a witness is in custody at the time of the trial, the only way of bringing him into court to give evidence, is by a writ of *habeas corpus ad testificandum*. This writ can be obtained only upon motion to the court, and in the English practice the application must be accompanied by an affidavit showing that the witness is a material one; but this affidavit is not always required in practice in Illinois. If the motion is allowed, the writ is made out, signed and directed, and delivered to the officer in whose custody the witness is held, who will bring him up, on being paid his reasonable charges.²

For a form of petition for a writ of *habeas corpus ad testificandum*, see the chapter on *Habeas Corpus*.

The affidavit which it is necessary to make in order to obtain a continuance on account of the absence of a material witness, is considered under the head of Continuances.³

The witnesses in a cause may, in the discretion of the court, be separated during their examination.⁴

DEPOSITIONS (IN ILLINOIS).

Cases in which they may be taken.—When any person whose testimony is required in any suit at law, pending in any

¹ *Bonner v. People*, 40 Ill. App. 628.

² 2 Tidd Pr. 724.

³ Chapter XXIV, *ante*.

⁴ *Errisman v. Errisman*, 25 Ill. 136; *Staver v. Abbott*, 49 Ill. App. 429.

court in the state, is a non-resident, or resides in a different county from that in which the court is held, or is about to depart from the state, or is in custody on legal process, or is unable to attend court on account of advanced age, sickness, or other bodily infirmity, his deposition may be taken, in the manner pointed out by the statute.¹

Of witnesses residing in another county, infirm witnesses, etc.—In all cases where the witness resides in a different county from that in which the court is held, or is about to depart from the state, or is in custody on legal process, or is unable to attend court on account of advanced age, sickness or other bodily infirmity, the party desiring his testimony, upon filing a proper affidavit, may have his deposition taken before any judge, justice of the peace, clerk of a court, master in chancery, or notary public, without a commission or interrogatories for such purpose, on giving the required notice to adverse party.²

The affidavit to be filed in such case may be as follows:

No. 337. Affidavit to be filed before taking deposition of witness residing in another county, etc.

In the ——— Court.

A. B.	} <i>Assumpsit.</i>	A. B., the above named <i>plaintiff</i> , makes oath and says that L. M., who is a material witness for <i>this affiant</i> , in this cause, resides in the county of ———, in this state, (or “is about to depart from this state,” or “is in custody on legal process,” or “is unable to attend the said court on account of advanced age,” etc., as the case may be), and that this affiant desires the deposition of the said G. H., to be read in evidence on the trial of this cause.
C. D.		

A. B.

Subscribed and sworn, etc.

Upon filing the affidavit, a written notice should be given to the adverse party, of the time and place of taking such deposition, which notice should be served by copy. The statute requires the notice to be given ten days before the time for taking the deposition, “and one day in addition thereto (Sundays inclusive) for every fifty miles’ travel from the place of

¹ 1 Starr & Curtis’ An. Stat. 1086;
Rev. Stat. (1895) 767; Rev. Stat.
(1893) 719.

² Rev. Stat. (1895), 768.

holding the court to the place where such deposition is to be taken." The statute further provides that "if the party entitled to notice and his attorney reside in the county where the deposition is to be taken, five days' notice shall be sufficient."¹

The notice may be in the following form :

No. 388. *Notice to take deposition of witness residing in another county, etc.*

In the ——— Court.

A. B. }
vs. } *Assumpsit.*
C. D. }

To the above named *C. D., defendant.*

Take notice, that on, etc., between the hours of — *a. m.* and — *p. m.*, at, etc., before J. K., a *justice of the peace* of that *county*, or some other officer authorized by law to take depositions in such cases, the *plaintiff* will proceed to cause to be taken the deposition of L. M., residing in the said county of —, to be read in evidence on the trial of this cause, on the part of the *plaintiff*; at which time and place above mentioned for the taking of such deposition, you can appear, and cross-examine the said witness, if you shall see fit so to do.

(*Date.*)

E. F., Attorney for *Plaintiff.*

At the time and place appointed in the notice, the party at whose instance the deposition is taken, and the adverse party, if he sees fit, or their attorneys, together with the deponent, go before the officer who is to take the deposition. The deponent is then duly sworn, and the party who caused him to be summoned first examines him, and the opposite party, if present, then cross-examines him.² The questions of each party, the deponent's answers to them, and the objections which either party may make to any questions or answers, are written down in their order; and when the examination on both sides is concluded, and the result reduced to writing, and read over to the deponent, he signs his name at the foot of the deposition.

The general directions for taking depositions by commissioners are applicable in some respects to cases of this kind.

¹ 1 Starr & Curtis' An. Stat. 1085; Rev. Stat. (1893) 719; Rev. Stat. (1895) 767.

² *Lewis v. Fish*, 40 Ill. App. 372.

Any officer or commissioner may issue a *subpoena*, if necessary, to compel the attendance of any witness whose deposition he may be required to take.¹

If a party gives notice of the taking of two depositions in different places on the same day, so that the opposite party can not be present to cross-examine both the witnesses, he may elect which examination he will attend, and the other depositions will be suppressed.²

An appearance and cross-examination of the witness will be deemed a waiver of objection to the sufficiency of the notice;³ and where a party consents to the taking of a deposition, it may be read in evidence, although no affidavit was filed, as required by the statute.⁴

It is not irregular to take the deposition of a witness in a county other than that in which he resides. He may not be bound to attend, but if he does, it is regular.⁵

Of witnesses residing in the state, more than 100 miles distant; non-resident witnesses; and witnesses in military or naval service.—The statute (sec. 26 of the act on Evidence and Depositions) provides as follows: “When the testimony of any witness residing within this state, more than one hundred miles from the place of holding the court, or not residing in this state, or who is engaged in the military or naval service of this state or of the United States, and is out of this state, shall be necessary in any civil cause pending in any court of law or equity in this state, it shall be lawful for the party wishing to use the same, on giving to the adverse party, or his attorney, ten days’ previous notice, together with a copy of the interrogatories intended to be put to such witness, to sue out from the proper clerk’s office a *dedimus potestatem* or commission, under the seal of the court, directed to any competent and disinterested person as commissioner, or to any judge, master in chancery, notary public or justice of the peace of the county or city in which such witness may reside,

¹ 1 Starr & Curtis 1090; Rev. Stat. (1893) 721; Rev. Stat. (1895) 769.

² *Hankinson v. Lombard*, 25 Ill. 572.

³ *County v. Bledsoe*, 12 Ill. 267; see

Cook v. Orne, 37 Ill. 186; *Brackett v. Nikirk*, 20 Bradw. 525.

⁴ *Picard v. Bates*, 38 Ill. 40.

⁵ *Harding v. Larkin*, 41 Ill. 413.

or in case it is to take the testimony of a person engaged in such military service, to any commissioned officer in the military or naval service of this state or the United States, authorizing and requiring him to cause such witness to come before him, at such time and place as he may designate and appoint, and faithfully to take his deposition upon all such interrogatories as may be inclosed with or attached to said commission, both on the part of the plaintiff and defendant, and none others; and to certify the same, when thus taken, together with the said commission and interrogatories, into the court in which such cause shall be pending, with the least possible delay."¹

The statute must be substantially complied with, and no material deviation therefrom will be allowed, unless by consent or waiver of the parties to the suit.²

The notices and formal interrogatories to be used in such cases may be as follows:

No. 339. *Notice and interrogatories for taking deposition upon interrogatories in writing.*

In the — court of the county of —, in the State of Illinois.

A. B. }
vs. } *Assumpsit.*
C. D. }

To the above named C. D., *Defendant.*

Take notice, that on, etc., the *plaintiff* will sue out from the clerk's office of the said court a commission, pursuant to the statute, to take the deposition of L. M., residing in the *city* of —, in the county of — and state of —, to be read in evidence on the part of the *plaintiff*, on the trial of this cause. The interrogatories to be propounded to the said L. M. in this behalf, on the part of the *plaintiff*, are hereto subjoined; and you can file cross-interrogatories, and join in such commission, if you shall see fit so to do.

(*Date.*)

E. F., Attorney for *Plaintiff*.

In the — court of the county of — in the State of Illinois.

A. B. }
vs. } *Assumpsit.*
C. D. }

Interrogatories to be propounded to L. M., a witness to be pro-

¹ 1 Starr & Curtis, 1086; Rev. Stat. (1895), 767; Rev. Stat. (1893), 719; see *Brown v. Luehrs*, 79 Ill. 575.

² *Cargan v. Anderson*, 30 Ill. 95;

see *County v. Bledsoe*, 12 Ill. 267; *Ballance v. Underhill*, 3 Scam. 453; *Hawks v. Lands*, 3 Gilm. 227; *Edelman v. Byers*, 75 Ill. 367.

duced, sworn and examined in this behalf, on the part of the *plaintiff*, by virtue of the commission to be issued in pursuance of the foregoing notice :

Interrogatory 1. What is your name, age, occupation, and place of residence?

Int. 2. Do you know the parties plaintiff and defendant in this cause, or either of them? If yea, how long have you known them respectively?

(Proceed with the interrogatories—numbering them consecutively—touching the matters desired to be proved.)

Lastly. Do you know of any other matter or thing, of benefit or advantage to the *plaintiff*, touching the matters in controversy in this cause, in addition to what you have already stated? If yea, state the same as fully as if thereto particularly interrogated.

E. F., Attorney for *Plaintiff*.

It is usual to name the commissioner in the notice; but in the case of *Cole v. Chouteau*, 18 Ill. 439, the court said : “ The statute here does not authorize the party to appoint the commissioner, consequently he could not give his name in the notice to sue out the *dedimus*. It is not required by the statute, for the clerk might appoint some other than the one so nominated in the notice.” A commission not directed to any particular person, but directed generally to any judge, master in chancery, notary public, etc., of the county in which the witness resides, has been held to be sufficient.¹

In a suit against two joint-debtors, a notice to one of them, of the issuing of a commission to take depositions, is insufficient, and the deposition can not be used against him who was not served with notice.²

The usual mode of serving a notice of suing out a commission, is to deliver a copy of the notice and interrogatories to the opposite party, or his attorney, who will generally acknowledge the receipt of the same on the back of the original. If this is not done, an affidavit of service should be attached. The service must be at least ten days before the issuing of the commission.³

Of non-resident witnesses, upon oral interrogatories.—The statute provides, in this regard, as follows : “ When a party shall desire to take the evidence of a non-resident wit-

¹ *Brackett v. Nikirk*, 20 Ill. App. 525.

² *McConnel v. Stetinius*, 2 Gilm. 707.

³ *Cargan v. Anderson*, 30 Ill. 95.

ness, to be used in any cause pending in this state, the party desiring the same, or, where notice shall have been given that a commission to take the testimony of a non-resident witness will be applied for, the opposite party, upon giving the other three days' notice in writing of his election so to do, may have a commission, directed in the same manner as provided in section 26 of this act, to take such evidence, upon interrogatories to be propounded to the witness orally; upon the taking of which each party may appear before the commissioner, in person or by attorney, and interrogate the witness. The party desiring such testimony shall give to the other the following notice of the time and place of taking the same, to wit, ten days, and one day in addition thereto (Sundays included) for every one hundred miles' travel from the place of holding the court to the place where such deposition is to be taken."¹

The party who gives notice that he will sue out a *dedimus* to take the testimony of a witness upon written interrogatories, after receiving notice that the party to whom the notice was given has elected to take the deposition upon oral interrogatories, should reply with a notice of the time and place where such deposition will be taken upon oral interrogatories in accordance with the statute; he is the party desiring the testimony and should give notice of the time and place for taking the same.²

A motion to suppress a deposition taken upon written interrogatories should be sustained, where subsequent to the giving of the notice of the intention to take the same, the opposite party gave notice of his election to take it upon oral interrogatories. Sec. 28, Chap. 51, R. S., does not contemplate the issuing of two commissions, one to take the testimony upon written, and the other upon oral interrogatories.³

Notice by mail, or by advertisement.—With respect to notice where personal service can not be had, the statute provides as follows: "When the deposition of any witness is desired to be taken under the provisions of this act, and the adverse party is not a resident of the county in which the suit

¹ Rev. Stat. (1893), 720; Rev. Stat (1895), 768; 1 Starr & Curtis 1087.

² *Lewis v. Fish*, 40 Ill. App. 372.

³ *Lewis v. Fish*, 40 Ill. App. 372.

is pending, or is in default, and no attorney has appeared for him in such cause, upon filing an affidavit of such fact, and stating the place of residence of such adverse party, if known, or that upon diligent inquiry his place of residence can not be ascertained, the notice required by this act may be given by sending a copy thereof by mail, postage paid, addressed to such party at his place of residence, if known, or if not known, by posting a copy of such notice at the door of the court house where the suit is pending, or publishing the same in the nearest newspaper, and when interrogatories are required, filing copy thereof with the clerk of the court ten days before the time of suing out such commission.”¹

Instructions, etc., for taking depositions.—Where a deposition is to be taken under a commission, the following instructions and forms for the taking, certifying and returning of depositions, according to the laws of Illinois, may be inclosed with the commission :

No. 390. Caption of the deposition.

The deposition of L. M., of the city of —, in the county of — and state of —, a witness of lawful age, produced, sworn, and examined upon his oath, on, etc., at my office in, etc., by me, J. K., a commissioner duly appointed by the annexed commission, issued out of the clerk's office of the — court of the county of —, in the State of Illinois, under the seal of the said court, and to me directed, as such commissioner, for the examination of the said L. M., a witness in a certain suit now pending in the said court, wherein A. B. is plaintiff, and C. D. is defendant, on behalf of the *plaintiff*, as well upon the interrogatories of the *plaintiff* as upon the cross-interrogatories of the *defendant*, which were attached to the said commission, and upon none others. The said L. M., being first duly sworn by me, as a witness in the said cause, before the commencement of his examination, to testify the truth as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said parties, so far as he should be interrogated, testified as follows :

Interrogatory 1. (*Here insert the first interrogatory.*)

Answer. (*Here insert the answer—and so on successively, in the order in which the interrogatories may be propounded and answered. Then follow :*)

Cross-interrogatories on the part of the *defendant*, and answers thereto

¹ Rev. Stat. (1893), 720; Rev. Stat. (1895), 768; 1 Starr & Curtis 1087.

by the said L. M. (*Here write down the cross-interrogatories and answers successively.*)

(After the deposition is taken, the interrogatories and answers should be read over to the witness, and if he assents to the truth of the answers as written down, he will then sign his name at the bottom of the deposition, and swear to the truth of it before the commissioner. This oath is in addition to the preliminary oath, which is administered before the commencement of his examination.)

The commissioner should then certify as to the time, place and manner of taking the deposition, as follows:)

No. 391. Certificate.

I, the above named J. K., of, etc., a commissioner duly appointed by the annexed commission to take the deposition of the said L. M., the witness whose name is subscribed to the foregoing deposition, do certify, that before the commencement of his examination as a witness in the said suit between the said A. B., plaintiff, and the said C. D., defendant, he, the said L. M., was duly sworn by me, to testify the truth in relation to the matters in controversy between the said parties, so far as he, the said L. M., should be interrogated concerning the same; that the said deposition was taken at my office, in, etc., on, etc.; and that after the said deposition was taken by me, as aforesaid, the interrogatories and cross-interrogatories, and the answers thereto, as written down, were read over to the said L. M.; and that thereupon the said deposition was signed and sworn to by the said L. M., before me, at the place and on the day last aforesaid.

J. K., *Commissioner.*

(The foregoing certificate should be at the foot of the deposition, immediately following the signature of the witness.)

The commissioner should then fold up the deposition, together with the commission and interrogatories, and all exhibits, if any, properly marked or lettered, as "exhibit A," "exhibit B," etc., and inclose the whole in a suitable envelope; and then seal up the same securely with three seals, writing his name across the middle seal. The commissioner will also indorse the names of the parties to the suit across one end of the package, according to the proper title of the suit, and direct the package to the clerk who may have issued the commission, and transmit the same by mail to the proper post-office. No party, attorney or agent, or any person at all interested in the event of the suit, is permitted to dictate, write or draw up any part of the deposition, or—when taken upon written interrogatories—to be present during the taking of the same.¹

One caption will answer for the deposition of several witnesses, where they are all taken at the same time and place, to be read in the same suit, by modifying the form here given—for instance, as follows:)

The depositions of E. F., G. H. and L. M., of, etc., witnesses of lawful age, produced, sworn and examined on their respective oaths, etc. (*In the latter part of the caption say:*) The said E. F., G. H. and L. M., being first duly sworn by me, as witnesses in the said cause, etc. (*Then, at the commencement of each deposition, say:*) Interrogatories propounded to the said E. F., a witness produced and sworn as aforesaid, on the part of the plaintiff, and the answers of the said E. F. thereto, as follows:

Interrogatory 1. (*Here insert the interrogatory.*)

Answer. (*Here insert the answer.*)

(And so on successively with all the interrogatories to be propounded to that witness. Then insert the cross-interrogatories as directed. The deposition should then be read over to the witness, and signed and sworn to by him before the next witness is examined. Then proceed with the second and third witnesses, in like manner, to the end.)

¹ Rev. Stat. (1893) 721; Rev. Stat. (1895) 768; 1 Starr & Curtis 1089.

One certificate as to the time, place and manner of taking such depositions, and that they were signed and sworn to by such witnesses, respectively, will be sufficient, provided due care is taken to insert the names of all the witnesses, and the certificate is in other respects in conformity with the form given in the first instance.)

The statute has fixed no form for either the caption or certificate to be attached to depositions. If they are taken and certified in substantial conformity with the requirements of the statute, they will not be suppressed on merely technical objections.¹

When the deposition is taken by a justice of the peace, notary public, or other officer, as such, he should so describe himself in the caption and certificate, and not as commissioner; and if so taken in another state, his return must be accompanied by a certificate of his official character, under the great seal of the state, or under the seal of the proper court of record of the county or city where the deposition is taken.²

Interrogatories accompanying a commission to take a deposition need not be copied into the deposition. It is sufficient if they were propounded to the witness, answered by him, and so referred to that the court can see the deposition was fairly taken.³

A deposition will be sufficient if it shows that the witnesses were sworn, although it may not appear in the right place, or be set out in the certificate, which ought to come at the close of the deposition.⁴

The indorsement of the names of the parties litigant is directed by the statute, on the return of depositions; but an omission thereof, unless injury arises from the neglect, will not be fatal.⁵ It seems that where the names of partnerships are indorsed as parties litigant, it is a substantial compliance with the statute.⁶

It is a valid objection to a deposition, that it has been dic-

¹ *Behrensmeyer v. Kreitz*, 135 Ill. 151.

² Rev. Stat. (1893) 720; Rev. Stat. (1895) 768; 1 Starr & Curtis 1088; see *Wheeler v. Shields*, 2 Scam. 348; *McCoy v. People*, 71 Ill. 111; *Edleman v. Byers*, 75 Ill. 367; *Eisenmeyer v. Sauter*, 77 Ill. 515; see

Brown v. Luehrs, 79 Ill. 575; *Kendall v. Limberg*, 69 Ill. 356.

³ *Hawks v. Lands*, 3 Gilm. 227.

⁴ *County v. Bledsoe*, 12 Ill. 267; see *R. R. Co. v. Cowles*, 32 Ill. 116; *Kendall v. Limberg*, 69 Ill. 356.

⁵ *Cole v. Choteau*, 18 Ill. 439; see *R. R. Co. v. Coppinger*, 66 Ill. 510.

⁶ *Forsyth v. Baxter*, 2 Scam. 9.

tated or drawn up by an attorney in the cause; but the objection must be supported by proof of the fact.¹

Where a *dedimus* was directed to a commissioner to take the testimony of "Seymour Rank," and the deposition returned was that of "Seigmond Rank," the variance was held to be fatal.²

Depositions taken in one suit may be used in another, between the same parties, where the same matters are in controversy.³

A party may cause a second deposition of a witness to be taken, without leave for that purpose; but it is discretionary with the court to say which shall be read.⁴

Where a deposition has been lost, and the witness is dead at the time of the trial, the contents of the deposition may be proved, like those of any other lost paper.⁵

It is no objection that a witness, who is a party to the suit, wrote his own answers to the interrogatories in his deposition.⁶

It is no objection that a deposition was taken by a typewriter when the commissioner certifies that it was taken by him.⁷ Where a commission issued from this country in the English language to a foreign country is returned with the answers of the witness written in the language thereof, the same may be translated, and the translation given in evidence, but such translation may be shown to be erroneous.⁸

On an objection to a deposition, on the ground that it came to the clerk unsealed, it will be presumed that the officer who took the deposition did his duty, and sent the same properly sealed, and the burden of proof is on the objector.⁹ Where the deposition of a witness taken by the plaintiff is read in

¹ *King v. Dale*, 1 Scam. 514; see 1 Starr & Curtis 1089; Rev. Stat. (1893), 721; Rev. Stat. (1895), 769.

² *Scholes v. Ackerland*, 13 Ill. 650; see *McCoy v. People*, 71 Ill. 111; *Trans. Co. v. Leysor*, 89 Ill. 43.

³ *McConnel v. Smith*, 27 Ill. 232; *McConnel v. Smith*, 23 Ill. 611; *Wade v. King*, 19 Ill. 300; *Doyle v. Wiley*, 15 Ill. 576; *Goodrich v. Han-son*, 33 Ill. 498; 3 Greenl. Ev. 326;

Cookson v. Richardson, 69 Ill. 137; *Jarret v. Phillips*, 90 Ill. 237; *Pratt v. Kendig*, 128 Ill. 293.

⁴ *Beach v. Schmulz*, 20 Ill. 185.

⁵ *Aulger v. Smith*, 34 Ill. 534.

⁶ *Wood v. Shaw*, 48 Ill. 273.

⁷ *Behrensmeyer v. Kreitz*, 135 Ill. 591.

⁸ *Christman v. Ray*, 42 Ill. App. 111.

⁹ *In re Noble*, 124 Ill. 266.

evidence by the defendant, the person whose deposition has been so taken and read will not be the witness of the plaintiff, who will have the same right to contradict such witness as any other witness introduced by the defendant.¹

Where a deposition is taken by a party incompetent to testify on the ground of interest, and an objection is interposed to the competency which is noted by the officer taking the deposition, and the party objecting cross-examines the witness, and on his motion the deposition is excluded by the court, the other party will not have the right to read, on the hearing, the cross-examination. By cross-examining an incompetent witness before the court passes on an objection to the competency, the party so cross-examined does not make the matters drawn out by his examination competent evidence against him.²

Exceptions or objections to.—Objections to a deposition, and motions to suppress the same, may be made after leave has been obtained to open the same before the trial is entered upon.³ All exceptions to depositions, which go to the *form* of the same, or to the incompetency of witnesses, must be taken or made before the case is called for trial and submitted to the jury. If formal objections exist, they should be made and settled on exceptions before the trial, so that if they are sustained the party in whose favor they were taken may procure the evidence of the witness on the trial or retake his deposition.⁴ Objection to their *substance*, however, may be made on the trial.⁵

Before the objection that a deposition in a given cause does not contain the best evidence of the matters referred to can be considered, it is essential, before trial, to move to suppress the same.⁶ If leading questions are propounded to a wit-

¹ *Bloomington v. Osterle*, 139 Ill. 120.

² *Achilles v. Achilles*, 137 Ill. 589.

³ *Everingham v. Lord*, 19 Ill. App. 565; *Corgan v. Anderson*, 30 Ill. 95.

⁴ *Winslow v. Newlan*, 45 Ill. 145; *Frink v. McClung*, 4 Gilm. 569; *Kimball v. Cook*, 1 Gilm. 423; *Thomas v. Dunaway*, 30 Ill. 373; *R. R. Co. v. Baddeley*, 54 Ill. 19; *R. R. Co. v.*

McKinley, 64 Ill. 338; *Kassing v. Mortimer*, 80 Ill. 602; *Stowell v. Moore*, 89 Ill. 563; *M. D. Co. v. Lessor*, 89 Ill. 45; *Warren v. Warren*, 105 Ill. 568; *Carter v. Carter*, 37 Ill. App. 219; *Sheldon v. Burry*, 39 Ill. App. 154; *Dunbar v. Gregg*, 44 Ill. App. 527.

⁵ *Frink v. McClung*, 4 Gilm. 569.

⁶ *Carier v. Carter*, 37 Ill. App.

ness whose deposition is being taken upon oral interrogatories, an objection to the form of a question must be made and noted at the time, or such objection will be waived. If, however, the party against whom the deposition is intended to be used, is not present when it is taken, the rule will not apply.¹

A party can not, it seems, have the deposition taken for his opponent suppressed for want of full answers by the witness to the latter's interrogatories.² But by the statute, the court may allow another commission to issue, if it appears that the witness has not given full or proper answers, or that a further examination ought to be allowed to either party.³

A motion to suppress a deposition upon a specific ground is a waiver of all other grounds of objection.⁴

A motion to suppress a deposition on the ground it was not properly sealed and directed, comes too late after a general order for the opening of all depositions, unless some good reason is given for the delay. The court upon objection taken before such order is made, can then decide the motion by inspection, instead of acting upon affidavits.⁵

It is not sufficient to object to depositions before the trial; objections should be made and exceptions preserved when they are offered in evidence.⁶

The rule seems to be well recognized that after a deposition taken in a cause has been read without objections upon one trial, it can not afterwards be objected to on account of any defect existing at the time it was so used.⁷

Where portions of an answer in a deposition are improper, the same should be eliminated before the deposition is read to the jury.⁸

219; *Dunbar v. Gregg*, 44 Ill. App. 527.

¹ *Goodrich v. Hanson*, 33 Ill. 499; see *Cooke v. Orne*, 37 Ill. 186; *Lockwood v. Mills*, 39 Ill. 602; *Phy v. Clark*, 35 Ill. 377.

² *Cole v. Choteau*, 18 Ill. 439.

³ Rev. Stat. (1893) 721; Rev. Stat. (1895) 769; 1 Starr & Curtis 1089.

⁴ *Bartee v. Jones*, 33 Ala. 24; *Saltmarch v. Bower*, 34 Ala. 613; *Brackett v. Nikirk*, 20 Ill. App. 525.

⁵ *In re Noble*, 124 Ill. 266.

⁶ *Shedd v. Dalzell*, 30 Ill. App. 356; *Gardner v. Haynie*, 42 Ill. 291.

⁷ *Evans v. Hettich*, 7 Wheat. 453; *Spence v. Smith*, 18 N. H. 587; *Hill v. Meyers*, 43 Pa. St. 170; *McMillen v. R. R. Co.*, 56 Iowa 421; *Woodruff v. Monroe*, 33 Md. 146; *Brackett v. Nikirk*, 20 Ill. App. 525; see *Bush v. Stanley*, 122 Ill. 406.

⁸ *R. R. Co. v. Southworth*, 32 Ill. App. 307.

CHAPTER XXXV.

JUDGMENTS.

A judgment in law is a solemn determination of a question, declared by a court. The language used in a judgment is, that "it is considered by the court," etc., the theory being that the function of the court is not to give its own decision, but to ascertain and pronounce the decision of the law. To give validity and full force to a judgment, the court which renders it must have competent jurisdiction over the subject-matter concerning which it adjudicates, and the particular person or thing on whom or concerning which it passes judgment;¹ the cause must have been properly brought before the court; and the trial must have proceeded with due regard to all those forms which are established by law, to prevent surprise, neglect, or error.

Judgments are either *interlocutory* or *final*. The former are such as are given during the progress of a suit, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit—as, in the action of *account*, that the defendant account; or where there is a default, and a writ of inquiry awarded, etc. The latter are such as at once put an end to the action. They are the sentence of the law, given by the court—as that the plaintiff recover his damages and costs; or, if for the defendant, that the plaintiff take nothing by his writ, and that the defendant recover his costs, and sometimes also his debt or damages, where he has pleaded a set-off. A judgment is said to be final when it terminates the litigation between the parties on the merits of the case.²

Judgments may also be divided into four kinds: *First*,

¹ *Dunham v. Dunham*, 57 Ill. App. 475.

² *R. R. Co. v. Chicago*, 148 Ill. 141; *Glade v. Brick Co.*, 158 Ill. 39.

where both the facts and the law arising thereon are admitted by the defendant, as charged in the plaintiff's declaration; as in cases of judgment by *confession* or *default*. *Second*, where the plaintiff is convinced that the facts, or the law, or both, are not sufficient to support his action, and he therefore abandons his suit; as in cases of *nonsuit* or *retrahit*. *Third*, where the facts are confessed by the parties, and the law determined by the court; as in cases of judgment upon *demurrer*, or an *agreed statement of facts*. *Fourth*, where the law is admitted by the parties, and the facts disputed; as in the case of judgment on a verdict.¹

Judgment by default.—When the defendant fails to appear and make a proper defense, a judgment may be taken against him by default. Before doing so, however, the plaintiff should examine the writ, and see that it is in due form,² and properly attested; and also the return of the sheriff, to ascertain whether proper service has been made, and whether the return is in due form. If the return is insufficient, the court will, on motion, permit the officer to amend it.³

Where too large a judgment has been rendered against a defendant, by default, (but less than the amount claimed in the declaration,) he should apply by motion to the court rendering the judgment, to correct the mistake.⁴ After a considerable delay, it will not be corrected on error.⁵

A judgment by default will not be regular unless the defendant has been duly served with process. It should appear from the return that the writ has been served, and when, and on whom,⁶ and that the service was in due time.⁷ While an officer's return can not be contradicted so as to defeat jurisdiction, yet it may be done to excuse a default.⁸

¹ See 3 Blacks. Com., 396; Howe's Prac. 265.

² *Culver v. Phelps*, 130 Ill. 217.

³ *Moore v. Purple*, 3 Gilm. 149; *Montgomery v. Brown*, 2 Gilm. 581; *People v. Harrison*, 82 Ill. 84.

⁴ *Riely v. Barton*, 32 Ill. App. 528; *Hall v. Bank*, 133 Ill. 244.

⁵ *Elston v. Dewes*, 28 Ill. 436; see *Linder v. Monroe*, 33 Ill. 388.

⁶ See *Pardon v. Dwire*, 23 Ill. 572; *Bancroft v. Speer*, 24 Ill. 227; *Ogle v. Coffey*, 1 Scam. 239; *Pattison v. Hood*, 3 Scam. 152; *Schmidt v. Thomas*, 33 Ill. App. 110.

⁷ *Pattison v. Hood*, 3 Scam. 152.

⁸ *Serafield v. Sheeler*, 18 Bradw. 507; *Culver v. Phelps*, 130 Ill. 217.

When a defendant has pleaded, the plaintiff has no right to have him called, and take judgment by default;¹ and where the record shows that a plea was filed, and a judgment by default rendered, on the same day, the judgment will be reversed.²

It is erroneous to proceed to judgment by default against one or more of several joint defendants, without a final disposition of the cause as to the others;³ and where one pleads, the cause should be tried before a rendition of final judgment against the others.⁴ And where two are jointly sued, and are served with process, and one pleads, and procures a change of venue, and the other makes default, it is error to take judgment against the defendant in default alone.⁵ Where a judgment is vacated as to one of several defendants it must be vacated as to all.⁶

See *Setting Aside Default*, page 798, *ante*.

Damages—Assessment of.—Assessment of inquisitions of damages are generally taken, in Illinois, in open court;⁷ but a writ of inquiry may be directed to the sheriff of the county, to be executed in vacation.⁸ If it appears that an important question of law will arise on the execution of the writ, the court will order it to be executed in open court.⁹ The writ may be executed by the sheriff at any place within the county.¹⁰ If any irregularity occurs, such as want of notice, etc., the proper course is to move the court, upon affidavit of facts, to set aside the inquest;¹¹ and the insufficiency of the writ can not be

¹ *Manlove v. Bruner*, 1 Scam. 390; *McKinney v. May*, 1 Scam. 534; *Parrott v. Goss*, 17 Ill. App. 110; *Pana v. Humphreys*, 39 Ill. App. 641; *Barnett v. Craig*, 38 Ill. App. 96; *Griswold v. Brock*, 29 Ill. App. 423; *Fauret v. Bank*, 37 Ill. App. 322; *Race v. Ass'n*, 50 Ill. App. 131; *Bank v. Fairbank*, 54 Ill. App. 296.

² *Lyon v. Barney*, 1 Scam. 387.

³ *Kingsland v. Koeppe*, 137 Ill. 344.

⁴ *Wight v. Hoffman*, 4 Scam. 361; *Russell v. Hogan*, 1 Scam. 552; see *Flake v. Carson*, 33 Ill. 518.

⁵ *Jansen v. Grimshaw*, 125 Ill. 468; *Brown v. Tuttle*, 27 Ill. App. 389.

⁶ *Claflin v. Dunne*, 129 Ill. 241; *Reynolds v. Barnard*, 36 Ill. App. 218.

⁷ *Bell v. Aydelott*, Breese 45; see *Ins. Co. v. Phelps*, 27 Ill. 71; *Reeb v. Bosch*, 17 Ill. App. 426.

⁸ *Ins. Co. v. Phelps*, 27 Ill. 71; *Vanlandingham v. Fellows*, 1 Scam. 233.

⁹ *Tillotson v. Cheetham*, 2 Johns. 107; *Tidd's Pr.* 513.

¹⁰ *Vanlandingham v. Fellows*, 1 Scam. 233; *Ins. Co. v. Phelps*, 27 Ill. 71.

¹¹ *Vanlandingham v. Fellows*, 1 Scam. 233; *Moore v. Purple*, 3 Gilm. 149.

assigned for error, the proper practice being to move the court wherein the suit is pending to quash it.¹ The sheriff, in executing the writ, acts ministerially, and not judicially.²

In the assessment of damages on a writ of inquiry, the defendant may cross-examine or introduce witnesses, to reduce the amount claimed;³ and if the inquest is taken in open court he may have the jury instructed as to the law; and he may take a bill of exceptions, or may move to set aside the inquest, upon affidavit showing the evidence.⁴

When a party is dissatisfied with an assessment of damages on default, he should file an affidavit showing all the evidence heard, and move to set aside the inquest, or the default and inquest; and in case the court denies the motion, it seems the decision may be reviewed on error.⁵

The default of the defendant, as well as his failure to plead over after a demurrer has been overruled, admits the cause of action, but not the amount of damages claimed in the declaration; and the amount of damages may be litigated upon the writ of inquiry.⁶ A default precludes the defendant from questioning the validity of an indorsement of a note on which he is sued.⁷

The statute of Illinois provides that "in all suits in the courts of record in this state, upon default, where damages are to be assessed, it shall be lawful for the court to hear the evidence and assess the damages, without a jury for that purpose. In all cases where interlocutory judgment shall be given in any action brought upon a penal bond, or upon any instrument in writing, for the payment of money only, and the dam-

¹ *Moore v. Purple*, 3 Gilm. 149.

² *Tillotson v. Cheetham*, 2 Johns. 63; *Vanlandingham v. Fellows*, 1 Scam. 233.

³ And. Steph. Pl. 195, note 2; *Bridges v. Stephenson*, 10 Bradw. 369; *Briggs v. Snegham*, 45 Ind. 14; *Madison Co. v. Smith*, 95 Ill. 328; *Ry. Co. v. Holbrook*, 72 Ill. 419.

⁴ See *R. R. Co. v. Ward*, 16 Ill. 522; *Hotsinger v. Coleman*, 16 Ill. 71; *Horton v. Bailey*, 1 Scam. 213; *Gil-*

lett v. Stone, 1 Scam. 539; *Kalkaska v. Thomas*, 17 Ill. App. 235.

⁵ *Motsinger v. Coleman*, 16 Ill. 71; see *Vanlandigham v. Fellows*, 1 Scam. 233.

⁶ *R. R. Co. v. Lomax*, 7 Ind. 406; *Runnion v. Crane*, 4 Blackf. 466; see *R. R. Co. v. Ward*, 16 Ill. 522; *Lucas v. Spencer*, 27 Ill. 15.

⁷ *Underhill v. Kirkpatrick*, 26 Ill. 84.

ages rest in computation, the court may refer it to the clerk, to assess and report the damages, and may enter judgment therefor; *provided*, that either party may have the damages assessed by a jury.”¹

Judgment of nonsuit, etc.—Judgment of nonsuit may pass against the plaintiff, when, on the trial, he abandons his suit. By statute in Illinois, if the plaintiff desires to take a nonsuit, he must do so before the jury retires from the bar;² and it is held that when a cause is tried by the court, without a jury, a nonsuit may be taken at any time before the court notes down the finding.³

If, after issue is joined, the plaintiff neglects to bring such issue on to be tried in due time, as limited by the course and practice of the court, judgment will also be given against him for his default; and this is called a judgment *as in case of nonsuit*.⁴

A nonsuit is not regarded as a confession by the plaintiff that he has no cause of action, for the judgment in favor of the defendant is no bar to a second action for the same cause.⁵

Judgment may also be given against the plaintiff for not declaring, or replying, etc.; and these are called judgments of *non pros.* (*non prosequitur*.) So if he chooses, at any stage of the action, after appearance and before judgment, to say that he “will not further prosecute his suit,” or that he “withdraws his suit,” or (in case of a plea in abatement) prays that his “writ” or “declaration may be quashed,” that he may resort to a better one—there is judgment against him of *nolle prosequi*, *retraxit*, or *cassetur breve*, or *narratio*, in these cases respectively.⁶

In cases of nonsuit or *non pros.*, the plaintiff may be called, and his default entered, in like manner as where a defendant makes default, as above mentioned.

¹ 2 Starr & Curtis 1807; Rev. Stat. (1893) 1076; Rev. Stat. (1895) 1160; *Chicago v. Congdon*, 111 Ill. 309; *Palmer v. Harris*, 98 Ill. 507; *Pinkel v. Machine Co.*, 89 Ill. 277.

² Rev. Stat. (1893) 1077; Rev. Stat. (1895) 1161; 2 Starr & Curtis 1812; see 3 Bla. Com. 376; And. Steph.

Pl. 195; *Haskell v. Whitney*, 12 Mass. 47; *Berry v. Savage*, 2 Scam. 261; *Gordon v. Goodell*, 34 Ill. 429.

³ *Howe v. Harroum*, 17 Ill. 494; *Adams v. Shepard*, 24 Ill. 464.

⁴ And. Steph. Pl. 195.

⁵ 3 Bla. Com. 376.

⁶ And. Steph. Pl. 195.

One entitled to judgment must have it entered. A judgment *nunc pro tunc* will not be entered if the delay was caused by the *laches* of plaintiff.¹

Judgment on demurrer.—Judgment for the *plaintiff* on demurrer to a plea in abatement, or to a replication to such plea, is merely that the defendant answer over—*respondeat ouster*.² And in all other cases of demurrer, in actions sounding in damages, the judgment for the plaintiff is interlocutory merely, until the damages are assessed, which assessment is made in the same manner as has been shown in the case of a default, when final judgment is given. Judgment for the *defendant*, on demurrer, is in all cases final.³ Except in the case of a decision for the defendant on demurrer to a plea in abatement, or to a replication to such plea, the courts in Illinois usually grant leave, if asked, to the party against whom the decision on the demurrer is made, to plead over, or amend, as the case may be.⁴

Judgment on verdict.—On a verdict, the judgment, whether for the plaintiff or the defendant, is final—the jury at the same time trying the issue and assessing the damages, if any are given.

Form of judgment, etc.—A judgment for the *plaintiff* (except *respondeat ouster*) always follows the nature of the action. In actions of *assumpsit*, *covenant*, *trespass*, and the like, in which damages only are demanded, the judgment for the *plaintiff* is that he recover his damages, as found by the verdict (or in case of demurrer or default, that he ought to recover, etc., and, after the assessment, that he recover, etc.), together with his costs. In actions of *debt*, the judgment is that he recover his debt, and damages, if any, and costs. The proper form of a judgment for the plaintiff, in an action of debt on a penal bond conditioned for the performance of covenants, is that he recover the amount of the debt, to be discharged by the payment of the damages and costs.⁵ In *eject-*

¹ *Tyman v. Weinhard*, 153 Ill. 598.

² And. Steph. Pl. 192; *Smith v. Harris*, 12 Ill. 462; *Bradshaw v. Morehouse*, 1 Gilm. 395; *Young v.*

Giles, 113 Mass. 34; *Parks v. Smith*, 155 Mass. 26.

³ Steph. Pl. 192-3.

⁴ See section 3, Prac. Act.

⁵ *Eggleston v. Buck*, 31 Ill. 254;

ment, the entry is that he recover the premises demanded in the declaration, and costs, etc. In all cases, if the *defendant* prevails, he recovers his costs merely (except where he has pleaded and proved a set-off larger than the amount due to the plaintiff, in which case the defendant is entitled to judgment for the excess, as well as for his costs); and if the issue arises on a plea in abatement of the writ, etc., the judgment is that the writ be quashed, etc.; and in other cases the judgment is that the plaintiff take nothing by his writ, and that the defendant go thereof without day. In *replevin*, final judgment for the *plaintiff* is for his damages, which are usually nominal, as the goods demanded were delivered to him on the writ, and for his costs. For the *defendant*, the judgment is in general for a return of the goods, and for his costs. In *detinue*, the judgment is in the alternative, that the plaintiff recover the goods, or the value thereof, and his damages for the detention, and costs.¹ A judgment against a garnishee should be for the whole amount due from him to the attachment or judgment debtor, and not simply for the sum due the garnishing creditor.²

In no case can a plaintiff recover a greater sum as damages than he has laid in his declaration; but he may remit the excess and have judgment for the residue.³

Where the jury finds a sufficient tender to have been made, the court should render judgment in favor of the defendant for costs, and give the plaintiff leave to take out of court the sum tendered; and in such case the jury should not assess any damages.⁴

In a *qui tam* action on a statute, giving half of the penalty to the informer, a judgment against the defendant should be for the recovery of the debt, one-half to the people and one-half to the informer, and should award execution in that form.⁵

Parisher v. Waldo, 72 Ill. 71; *R. R. Co. v. Steele*, 69 Ill. 253; *O'Neil v. Nelson*, 22 Ill. App. 531.

¹ And. Steph. Pl. 80, note; 1 Chit. Pl. 124; 1 Humph. Pr.

² *Kern v. Ass'n*, 140 Ill. 371; *Ins. Co. v. Kirk*, 23 Ill. App. 19; *Boddie v. Mfg. Co.*, 51 Ill. App. 302; *Glover*

v. Wells, 40 Ill. App. 355; *Ham v. Perry*, 39 Ill. App. 341.

³ *Linder v. Monroe*, 33 Ill. 388; *Pierson v. Finney*, 37 Ill. 29.

⁴ *Cilley v. Hawkins*, 48 Ill. 309.

⁵ *R. R. Co. v. Herr*, 54 Ill. 356; see *R. R. Co. v. Tait*, 50 Ill. 48.

Usage in this state has justified a judgment for costs without stating the amount; but in general, a money judgment must be for a sum fixed.¹

Judgment after death of defendant.—If jurisdiction be obtained of the person of a defendant in his lifetime, by service of process or appearance, a judgment against him after his death is not void, but only voidable. And while such a judgment can not be attacked collaterally, it may be reversed on error, if the fact of the defendant's death appears from the record; if not, the judgment may be vacated, upon motion, in the court where it was rendered.²

¹Black on Judgments, Sec. 118;
Club v. Baldwin, 59 Ill. App. 61.

²*Claflin v. Dunne*, 129 Ill. 241.

CHAPTER XXXVI.

TRIAL OF RIGHT OF PROPERTY—INTERPLEADER IN ATTACHMENT.

Prior to the enactment of the statute providing for a trial of the right of property, when a sheriff levied an execution on personal property claimed by a party other than the defendant in the execution, and he was notified of such claim, if he disregarded the notice and sold the property, he incurred thereby all the liabilities flowing from his conduct in an action brought by the true owner or claimant against him for damages; and having no justification or excuse for selling property not belonging to the defendant in the execution, he could not escape a recovery. On the other hand if he refused to sell the property levied upon, the plaintiff in the execution could bring his action for damages. The sheriff was thus placed between two fires with no possibility of escape; and prior to the statute such actions were quite common, resulting in great losses to sheriffs and other like officers.¹

To remedy this evil, the statute of 1845 was enacted, which provided for an inquiry into the rights of the parties claiming the property, by a jury presided over by the sheriff, and enabled the sheriff to interpose the verdict of the jury as his justification for selling the property, or restoring it to the claimant, as the verdict might direct. In the case of *Rowe v. Bowen*, 28 Ill. 116, this was held to be the only object of the statute; that the proceeding did not conclude the parties contesting; that should the verdict of the jury be against the claimant he could, notwithstanding, bring his action against any party meddling with the property, other than the sheriff, and that the sheriff might, notwithstanding a verdict for the claimant, retain and sell the property at his peril if he chose so to do.²

¹ *Rowe v. Bowen*, 28 Ill. 120.

Hibbard v. Thrasher, 65 Ill. 479;

² See *Foltz v. Stevens*, 54 Ill. 180; *Jones v. People*, 19 Bradw. 300.

The court was driven to this conclusion in order to uphold the law as it then was, for the reason that the proceeding was before the sheriff, and under the constitution, no judicial power could be vested in such an officer. In that case, however, Mr. Justice Caton, in a dissenting opinion, makes the logical point, the effect of which is, that while the proceeding before the sheriff was not judicial, yet, the statute giving the right of appeal to the circuit court, the parties who availed themselves of it were thereby brought before a tribunal that had the power to hear and determine causes, and therefore its judgment would be *res adjudicata* as to all parties and privies.

The present statute (Sec. 10) provides that if judgment is rendered in favor of the claimant, the property levied upon shall be released. Under Sec. 11 the defeated party in such a trial may appeal, provided the same is prayed on the day of entering judgment. There was no such proviso in the old statute. This proviso is doubtless mandatory and the prayer on that day a prerequisite to the right, at least, as against a sale before the bond is filed, to perfect the appeal thereafter. The purpose of this requirement, evidently, was that the officer might know whether or not he should proceed to sell, if the time for sale had been fixed to take place within the five days allowed for appeal, or proceed to advertise for sale if it had not already been done.¹

The plaintiff and defendant in an execution issued pending a trial of the right of property between the latter as claimant and the judgment creditors of a third person, in goods levied on as property of such third person, are in such privity of relation that both will be alike bound by a judgment finding the right of property against the claimant.²

The circuit court is not, by the act providing for trial of right of property in the county court, deprived of jurisdiction to determine the right to attached property claimed by a third person, under the provision of the attachment and garnishment act.³

Proceedings for.—Section 1 of the statute provides that

¹ *People v. Ward*, 41 Ill. App. 470;

Ilg v. Eurbank, 59 Ill. App. 296.

² *Hill v. Reitz*, 24 Ill. App. 391.

³ *Springer v. Bigford*, 160 Ill. 495.

“whenever an execution or writ of attachment, issued from any court of record, shall be levied by any sheriff or coroner upon any personal property, and such property shall be claimed by any person other than the defendant in such execution or attachment, or shall be claimed by the defendant in execution or attachment as exempt from execution or attachment by virtue of the exemption laws of the state, by giving to the sheriff or coroner notice, in writing, of his claim, and intention to prosecute the same, it shall be the duty of such sheriff or coroner to notify the judge of the county court of such claim.”

The statute does not require the claimant of property taken on execution to state on whose execution the levy had been made, in the notice he serves. Notice to the officer that he claims the goods levied on, intends to prosecute his claim, and forbids the sale, is sufficient.¹

A landlord who has distrained upon the goods of his tenant, has a sufficient interest in them to enable him to be the claimant of the same on a trial of the right of property, if they are subsequently taken in execution.²

Making the claim to property which has been levied upon is merely an act *in pais*, and may be performed by an ordinary agent.³

Trial in county court.—Section 2 provides that the judge of the county court shall thereupon cause the proceeding to be entered on the docket of the county court, and the claimant shall be made plaintiff in the proceeding before the county court, and the plaintiff in the execution or attachment shall be made defendant in such proceeding.

Notice.—Section 3 provides that the clerk of the county court shall thereupon issue a notice, directed to the plaintiff in the execution or attachment, notifying him of such claim, and of the time and place of trial, which time shall not be more than ten days nor less than five days from the date of such notice.

Service of notice—Continuance.—Section 4 provides that such notice shall be served by the sheriff or coroner of any

¹ *Pearce v. Swan*, 1 Scam. 266;

³ *Webber v. Brown*, 38 Ill. 87.

² *Grimsley v. Klein*, 1 Scam. 342;

county where the plaintiff in execution or attachment may be found, in like manner as summonses in chancery are served, at least five days before the day of trial; and if such notice shall be served less than five days before the day of trial, the trial shall, on demand of either party, be continued for a period not exceeding ten days.

Notice by publication.—Section 5 provides that in case the sheriff or coroner shall make return of such notice that the plaintiff in the execution or attachment can not be found, the proceeding shall be continued for a period of not exceeding ninety days, and the plaintiff in the execution or attachment shall be notified of such proceeding by publication in like manner as non-resident defendants are notified in chancery cases.

Entering appearance.—Section 6 provides that if the plaintiff in the execution or attachment, or his attorney, shall, at least five days before the day of trial, file with the clerk of the county court a paper entering his appearance in such proceeding, then it shall not be necessary to notify such plaintiff as above provided.

Trial—Pleading—Jury.—Section 7 provides that the trial shall be without written pleadings, before the county judge, in the same manner as other trials before the county court, and may be by a jury if either party demand one.

A claimant of personal property levied on under an execution against another person, by giving notice of a trial of the rights of property, admits the validity of the execution.¹

On the trial of the right of property, a recital in the execution of the rendition of the judgment is sufficient proof of the judgment; the claimant, by giving notice, admits the regularity and existence of the proceedings against the defendant.²

In a trial of the right of property, the only question for decision is whether the property belongs to the claimant, and the burden of proof is upon the claimant.³

Trial by jury.—Section 8 provides that if a jury shall be demanded by either party, the judge shall direct the county

¹ *Thompson v. Willite*, 81 Ill. 356;
Merrick v. Davis, 65 Ill. 319.

² *Dexter v. Parkins*, 22 Ill. 143.

³ *Marshall v. Cunningham*, 13 Ill. 20; *Hansen v. Dennison*, 7 Bradw. 73; *Hardin v. Sisson*, 36 Ill. App. 386.

clerk to issue a venire for twelve competent jurors, unless the parties to such proceeding shall elect to have the same tried by six jurors, and deliver the same to the sheriff or coroner, who shall summon such jurors from the body of the county, to be and appear before such court at the time set for the return of such venire; and if by reason of non-attendance, challenge or otherwise, said jury shall not be full, the panel may be filled by talesmen. Said court shall have the same power to compel the attendance of jurors and witnesses as the circuit court has, and shall be governed by the same rules in impanelling a jury.¹

Subpœnas for witnesses.—Section 9 provides that the county clerk shall issue subpœnas for witnesses on the demand of either party.

Judgment—Exempt property—Costs.—Section 10 provides that in case the property shall appear to belong to the claimant, when the claimant is any person other than the defendant in execution or attachment, or in case the property shall be found to be exempt from execution or attachment, when the claimant is the defendant in the execution or attachment, judgment shall be entered against the plaintiff in the execution or attachment for the costs, and the property levied upon shall be released. If it shall appear that the property does not belong to the claimant, or is not exempt from execution or attachment, as the case may be, judgment shall be entered against the claimant for costs, and an order shall be made that the sheriff or coroner proceed to sell the property levied on.

Appeal—Bond—Trial de novo.—Section 11 provides that an appeal may be taken to the circuit court, as in other cases; *provided*, the same is prayed on the day of the entering of judgment; and the bond shall be given within five days from the time of entering judgment, and the trial in the circuit court shall be *de novo*.²

Judgment—Indemnity.—Section 12 provides that the judgment in such cases shall be a complete indemnity to the sheriff or coroner in selling or restoring any such property, as the case may be.

¹ Rev. Stat. (1893) 1458; Rev. Stat. (1895) 1557; 2 Starr & Curtis, 1413.

² See *People v. Ward*, 41 Ill. App. 470; *Ilg v. Burbank*, 59 Ill. App. 296.

Apportionment of costs—Fees.—Section 13 provides that if the judgment shall be for the claimant as to part of the property, and for the plaintiff in execution or attachment as to part, then the court shall apportion the costs in his discretion; and the sheriff, coroner and county clerk shall have the same fees as are allowed by law for similar services.

No. 392. Notice to sheriff of claim to property held by him.

STATE OF ILLINOIS, }
County of ———. } ss.

(Claimant,)	}	Trial of right of property.
vs.		
(Plaintiff in writ.)		

To ——— ———,

Sheriff of said County.

You will take notice that I claim to be the owner of the following described goods and chattels, to wit (*here describe property*), which said goods and chattels were on the — day of —, 18—, seized and attached by you under and by virtue of a certain writ of (*) attachment issued out of the office of the clerk of the — court of the county of — on the — day of —, 18—, at the suit of —, plaintiff, and against the estate of —, defendant;

That the said goods and chattels so seized and attached (*) by you as aforesaid were at the time the same were so seized and attached and still are my property and that I intend to prosecute my said claim therefor.

You will therefore please notify the judge of the county court of your said county of my claim, to the end that a trial of the right of property in the said goods and chattels may be had as provided by section 1, chapter 140a, of the revised statutes of Illinois.

—————,
Claimant.

If the property has been seized and levied upon, under and by virtue of a writ of *fiery facias*, omit all between the asterisks in the above precedent and insert in lieu thereof the following:

“*Fieri facias* issued out of the office of the clerk of the — court of the county of —, on the — day of —, 18—, under and upon a certain judgment (or decree) rendered by said court on the — day of —, 18—, in favor of —, plaintiff, and against —, defendant; that the said goods and chattels so seized and levied upon,” etc.

INTERPLEADER IN ATTACHMENT.

Section 29 of the Attachment Act provides that "In all cases of attachment, any person, other than the defendant, claiming the property attached, may interplead, verifying his plea by affidavit, without giving bail, but the property attached shall not thereby be replevied; and the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of property; in all cases where the jury find for a claimant, such claimant shall be entitled to his costs; and where the jury find for the plaintiff in the attachment, such plaintiff shall recover his costs against such claimant. If such claimant is a non-resident of the state he shall file security for costs as in case of non-resident plaintiff."¹

The statutory interpleader to try the title to property seized by attachment, is a substantial and valuable statutory right, and as it tends to prevent multiplicity of suits, the claimant of the property who asserts such right should not be deprived of it on merely technical grounds.

The statute allowing an interpleader in an attachment suit, does not, in terms, say that it shall be tried, or even interposed, before judgment in the original attachment suit. But the better practice is, first to settle the matter of the interpleader, and then render judgment upon the attachment; or, if such judgment has already been taken, to open it for the purpose of permitting the interpleader.

The remedy by interpleader lies in respect to both personal and real estate,² but it must be interposed while the attachment suit is still *in fieri*, which is before or during the term at which final judgment is entered against the defendant in attachment.

If an interpleader is not filed in apt time in an attachment suit, the plaintiff should move to strike it from the files. If, however, he demurs to the pleading, this will amount to a waiver of the objection that it was filed too late.³

¹Starr & Curtis 322; Rev. Stat. (1893), 173; Rev. Stat. (1895) 177.

Wear, 145 Ill. 653; *Ins. Co. v. Bank*, 68 Ill. 348.

²*Juilliard v. May*, 130 Ill. 87; *Bostwick v. Blake*, 145 Ill. 85; *Ducker v.*

³*Juilliard v. May*, 130 Ill. 87.

Where the issues formed upon an interpleader are found for the claimant after judgment against the defendant in the attachment and the issue of special execution, the court will have ample power to see that its process is not abused by making it the means of selling the property of one for the debt of another for which the former is not legally liable. The court can protect the successful claimant in his rights of property without vacating or changing the judgment rendered at a prior term against the defendant in attachment. A claimant of property attached is not bound by the judgment against the defendant in the attachment, ordering a sale of the property. He stands in the attitude of a stranger to the record.¹

The statute contemplates a speedy trial of an interpleader, and yet it gives either party a right of continuance for good cause shown.²

Under the statute giving any person, other than the defendant in attachment, the right to interplead and claim the property attached, a judgment in favor of a mortgagee so interpleading will be conclusive of his rights under the mortgage, as against the attaching creditor. But third persons can not litigate, in the name of the defendant in attachment, their rights to the property attached.³

In an attachment proceeding wherein certain insurance companies were garnished, third persons interpleading and claiming money due therefrom, it is not proper, the court finding that the interpleaders made out their cases, to render judgment in their favor for the amount due them, and for the attaching creditors for the balance; the proper practice in such case is to discharge the garnishees upon payment to the latter of this last sum named.⁴

The proceeding by way of interpleader authorized in courts of record, is not applicable to cases of attachment before justices of the peace.⁵

The only question under an interplea is the title to the

¹ *Juilliard v. May*, 130 Ill. 87.

⁴ *Glover v. Wells*, 40 Ill. App. 350.

² *Juilliard v. May*, 130 Ill. 87.

⁵ *Stafford v. Scroggin*, 43 Ill. App.

³ *Weber v. Mick*, 131 Ill. 520.

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property in dispute, and upon this the burden of proof is on the interpleader.¹

Fraudulent sales being good as between the parties to the transaction, whether the defense to the claim of the purchaser be interposed by the officer or the plaintiff in attachment suit, he must first establish the fact of the indebtedness.²

Upon the trial between an intervening claimant of the attached property and the plaintiff in attachment, the judgment obtained against the defendant in the attachment suit is no evidence against the intervenor of any debt from the defendant to the plaintiff existing before the entry of the judgment, nor of the truth of any of the averments in the declaration. If the plaintiff attacks the disposition of the property by the defendant for fraud on creditors he must prove his debt *aliunde*.³

Where the sheriff has money deposited in bank as such sheriff, belonging to various execution creditors, and the bank is garnisheed for an individual debt of the sheriff, he may, as trustee for and on behalf of the persons for whose use he holds such moneys, interplead, showing the facts of the case, and thereby protect the fund for those entitled to the same. A demurrer to such interpleader recognizes it as properly filed.⁴

In an attachment suit, an interpleader tenders the simple issue of property in the property in controversy, and that question can only be met by a traverse; pleading property in any one else without specifically denying property in the party interpleading, is foreign to the issue tendered and a demurrer will lie thereto.⁵

It is competent for the assignee of insolvent debtors, when his assignors have refused to traverse the facts stated in the affidavit upon which an attachment suit had issued against them, not because those facts were true, but because of collu-

¹ *Marshall v. Cunningham*, 13 Ill. 20; *Dexter v. Perkins*, 22 Ill. 143; *Merrick v. Davis*, 65 Ill. 319; *Bostwick v. Blake*, 145 Ill. 85; *Bank v. Canniff*, 51 Ill. App. 579.

² *Bank v. Canniff*, 51 Ill. App. 579.

³ *Springer v. Bigford*, 55 Ill. App. 198.

⁴ *Meadowcroft v. Agnew*, 89 Ill. 469.

⁵ *Ripley v. Bank*, 18 Bradw. 430.

¹ sion with the plaintiffs in the attachment suits, upon leave of court to intervene by interplea, setting up the assignment and his title to the property, and to traverse in the same plea the alleged facts in which the attachment was issued.¹

A judgment creditor can interplead in an attachment suit, and set aside a judgment entered therein on a debt not due.²

For form of interpleader, see precedent No. 220, page 388, *ante*.

¹ *Farwell v. Jenkins*, 18 Bradw. 491.

² *Schilling v. Deane*, 36 Ill. App. 513.

CHAPTER XXXVII.

TRIAL AND VERDICT.

Who may open the case.—The general rule is, that the party having the affirmative of the issue, and consequently the burden of the proof, shall open and close the case to the jury.¹ Where the defendant pleads the general issue and also special pleas and the general issue is not waived, the plaintiff always opens and closes;² but if the defendant, at the opening of the trial, waives the general issue;³ or if he pleads only a special plea in avoidance or justification, and issue is taken upon it, he will be entitled to the opening and closing of the case to the jury.⁴ If, however, the replication to such special plea confesses and avoids it, as in the case of a plea of infancy, where a new promise is set up in the replication, it seems that the plaintiff again acquires the right of opening and closing.⁵ And when there are several issues, if the plaintiff has the affirmative on either, he has the right to open and close the case.

Order of proceedings on the trial.—The counsel of the party having the affirmative opens the case by reading to the jury the declaration and subsequent pleadings, or stating the substance of the same—giving the jury to understand the questions to be determined—and briefly stating the facts and cir-

¹ *Harvey v. Ellithorpe*, 26 Ill. 418; *Hevard v. Slagle*, 52 Ill. 336; *Huddle v. Martin*, 54 Ill. 258; *Colwell v. Brower*, 75 Ill. 516; *Carpenter v. Bank*, 119 Ill. 352; *McReynolds v. R. R. Co.*, 106 Ill. 152; *Carroll v. Holmes*, 24 Ill. App. 453.

² *Vance v. Vance*, 2 Metc. (Ky.) 581; *Chesley v. Chesley*, 37 N. H. 229; *Carpenter v. Bank*, 119 Ill. 352.

³ *R. R. Co. v. Bryan*, 90 Ill. 126.

⁴ *Park Com'rs v. Trustees*, 107 Ill. 489; *Williams v. Shup*, 12 Bradw. 454; *Harvey v. Ellithorpe*, 26 Ill. 418; *Kells v. Davis*, 57 Ill. 261.

⁵ *Davis v. Mason*, 4 Pick. 156; *Sawyer v. Merrill*, 6 Pick. 478; *Brooks v. Barrett*, 7 Pick. 94; *Ayer v. Austin*, 6 Pick. 225; *Edwards v. Hushing*, 31 Ill. App. 223.

cumstances of the case, as they will appear from the evidence to be adduced, the application of the evidence to the points in issue, and the principles of law governing the same. He may also state the matters of defense, if they appear from the pleadings, or from a notice of set-off, or the like, and also the evidence by which those matters can be disproved.¹

The opposite counsel then states to the jury the matters of his client's defense, and the evidence which he will adduce in support of it, and comments upon the statements of the opposite party, so far as to make his own case intelligible. Or, the counsel may waive his statement of the defense, until the opposite party has rested his case. The usual practice in Illinois, however, is for both parties to state their cases respectively to the jury, before the examination of witnesses on either side. The limiting of the argument is a matter resting in the sound discretion of the court,² but it should be reasonably exercised in view of the character and facts of the case on trial.³ Counsel in argument to the jury should not use extravagant and intemperate language, calculated to arouse passion or prejudice,⁴ nor use language abusive of the parties, nor refer to irrelevant matters.⁵

If any question arises in the course of the trial, as to the competency of a witness, it must be determined before the witness is allowed to proceed. If a child is offered as a witness, the court will first examine it as to its sense of the obligation of an oath, before permitting it to be sworn.⁶ Where the objection is upon the ground of the infamy of the witness, such objection ought to be made before the witness is sworn; and the record of his conviction should be produced.⁷ A witness is not bound to answer a question in regard to any offense

¹ *DeWane v. Hanson*, 56 Ill. App. 575.

² *Foster v. McGill*, 119 Ill. 75; *Winslow v. Bloomington*, 24 Ill. App. 647.

³ *White v. People*, 90 Ill. 117.

⁴ *Ry. Co. v. May*, 33 Ill. App. 366.

⁵ *Hennies v. Vogue*, 87 Ill. 242; *Fox v. People*, 95 Ill. 71; *Duffins v. Peo-*

ple, 107 Ill. 113; *Elgin v. Eaton*, 2 Bradw. 90; *Herkimar v. Shea*, 21 Ill. App. 85; *R. R. Co. v. Perkins*, 125 Ill. 127.

⁶ *Draper v. Draper*, 68 Ill. 17.

⁷ *Maloney v. Daws*, 2 Hilton (N. Y.), 247; 2 Stark. Ev. 716; *Bartholomew v. People*, 104 Ill. 601.

imputed to him, which would subject him to punishment.¹ Whether he is bound to answer a question to his own disgrace merely, is not fully settled, but it seems that such question may be asked.² In Illinois a witness is not disqualified by reason of his conviction of any crime.³

In general, the party who has the burden of proof must in the first instance produce all the proofs he intends to offer in support of his allegation, and in closing he is confined to evidence which is directly in rebuttal.⁴

The court has a discretion, however, in the matter, which should be exercised so that neither party may be taken by surprise, or deprived without notice, of an opportunity to introduce material evidence.⁵

The court may, in its discretion, permit the introduction of evidence in chief at any time before or even after the opening of the argument, as justice may require.⁶

When the parties have concluded their evidence, the case is argued to the jury by the counsel for the party having the affirmative of the issue, after which the opposite party may reply, and then the former has the closing of the argument.

After the argument, the court instructs the jury as to the law of the case, upon the evidence adduced, and the case is then committed to the jury. In Illinois, the instructions must be reduced to writing.⁷

¹ *Smith v. People*, 20 Ill. App. 591; *Weldon v. Burch*, 12 Ill. 374; *Ray v. Bell*, 24 Ill. 444.

² *Newcomb v. State*, 37 Miss. 383; 1 Stark. Ev. 137, 144.

³ Rev. Stat. (1893) 715; Rev. Stat. (1895) 763; Starr & Curtis 1071.

⁴ *Mueller v. Rebhan*, 94 Ill. 142.

⁵ *Ib.*

⁶ *Bridge Co. v. Jameson*, 48 Ill. 281; *Goodrich v. Minonk*, 62 Ill. 121; *Elgin v. Renwick*, 86 Ill. 498; *Windheim v. Ohlendorf*, 3 Bradw. 436; *Wilburn v. Odell*, 29 Ill. 456; *Rowley v. Hughes*, 40 Ill. 316; *Munford v. Miller*, 7 Bradw. 62; *R. R. Co. v. Maroney*, 95 Ill. 179; *Fenton v. R.*

R. Co., 29 Ill. App. 250; *Chamberlain v. Chamberlain*, 116 Ill. 483; *Mosher v. Rogers*, 117 Ill. 446.

⁷ Rev. Stat. (1893) 1078; Rev. Stat. (1895) 1162; 2 Starr & Curtis 1814; *Evans v. George*, 80 Ill. 51; *R. R. Co. v. Harwood*, 80 Ill. 88; *Stowell v. Beagle*, 79 Ill. 525; *Ogden v. Kirby*, 79 Ill. 555; *R. R. Co. v. Chisholm*, 79 Ill. 584; *Roach v. People*, 77 Ill. 25; *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Reinback v. Crabtree*, 77 Ill. 182; *R. R. Co. v. Moore*, 77 Ill. 217; *Drohn v. Brewer*, 77 Ill. 280; *R. R. Co. v. Ingraham*, 77 Ill. 309; *Miller v. Balt-hasser*, 78 Ill. 302; *Tuttle v. Robinson*, 78 Ill. 332; *Chicago v. McGivin*,

Deliberations of the jury.—After the case has thus been committed to the jury, unless a verdict is agreed upon without quitting the jury-box, the jurors retire to a room provided for the purpose, to deliberate upon their verdict, a sworn officer accompanying and taking charge of them.

After the jurors have retired, they are not allowed to speak with any person save the officer who attends them, and not with him except to tell him whether or not they have agreed upon their verdict. Neither can they receive any new evidence, after having so retired. Even the judge who presided at the trial is not permitted to give any instructions or directions to the jury respecting the cause, unless in open court, and, where practicable, in the presence of both parties. Any such communication will be a good ground for a new trial.¹ But the jury may be called into the court for further instructions, either by agreement of counsel, or at the request of the jury,² and additional written instructions may be given in respect to a material point in the case concerning which no instruction has been given, where equal opportunity has been given to each side to submit further instructions.³ In Illinois, all papers read in evidence, other than depositions, may be carried from the bar by the jury.⁴

The jury should remain together until discharged by order of the court. By the practice of the courts, however, permission is frequently given to the jury, when out during a long adjournment of the court, or for the night, to seal up the verdict, when agreed upon, and then to separate;⁵ but a permission to the jurors to seal up their verdict and separate, does not dispense with their personal attendance in court when

78 Ill. 347; *Walcott v. Heart*, 78 Ill. 433; *Skelley v. Boland*, 78 Ill. 438; *McMillen v. Lee*, 78 Ill. 443; *Straus v. Minzesheimer*, 78 Ill. 492; *Ry. Co. v. Wilson*, 56 Ill. App. 364; *R. R. Co. v. Wheeler*, 149 Ill. 525; *Ellis v. People*, 159 Ill. 337.

¹ *Sargent v. Roberts*, 1 Pick. 337; *Crabtree v. Hagenbaugh*, 23 Ill. 349.

² *Lee v. Quirk*, 20 Ill. 392; see *Martin v. Morelock*, 32 Ill. 485.

³ *City v. Looney*, 159 Ill. 471; *Shaw v. Camp*, 160 Ill. 425.

⁴ Rev. Stat. (1893) 1078; Rev. Stat. (1895) 1162; 2 Starr & Curtis 1817; see *Hovey v. Thompson*, 37 Ill. 538; *Rawson v. Curtis*, 19 Ill. 456; *Hatfield v. Cheaney*, 76 Ill. 488; *Avery v. Moore*, 133 Ill. 74; *O'Neill v. Calhoun*, 67 Ill. 219.

⁵ *White v. Martin*, 2 Seam. 70; *Rigg v. Cook*, 4 Gilm. 336; *R. R. Co.*

the verdict is opened; and if any of them then dissent, the verdict can not be received.¹

If the jurors are wholly unable to agree upon a verdict, the court, in its discretion, may discharge them.

Delivery of the verdict, etc.—When the jurors have agreed upon their verdict, they return with it at once into the court, if then open; otherwise as soon as it is open. If by permission of the court they have separated after having agreed, the verdict should be in writing, and sealed up. The verdict, if in writing, is then read aloud by the clerk, or judge, who asks the jurors if they affirm the same; for a verdict is not valid and final until pronounced and recorded in open court; and before it is thus affirmed, the jury may vary the verdict as first returned.² After the verdict is received, the jury may be *polled*, at the request of the party against whom it is rendered—that is, the jurors may be asked, *individually*, whether they agree to the verdict as it is read; and then any juror may disagree thereto;³ but when they have given their verdict, and have affirmed it, it is beyond recall, and they are discharged from the case. No juror can then be allowed to say that he will not agree to it,⁴ or that he agreed to it upon mistaken principles;⁵ nor can the affidavit of a juror be read, to impeach the verdict.⁶

v. *Faitz*, 19 Ill. App. 88; *City v. Cockrum*, 59 Ill. App. 540.

¹ *Rigg v. Cook*, 4 Gilm. 336; *Martin v. Morelock*, 32 Ill. 485; see *Reins v. People*, 30 Ill. 256; *Pierce v. Hasbrouck*, 49 Ill. 23; *Powell v. Feeley*, 49 Ill. 143; *Paige v. O'Neal*, 12 Cal. 483; 3 Bla. Com. 377; *Ashton v. Touhey*, 131 Mass. 26; *R. R. Co. v. Faitz*, 19 Bradw. 85.

² *Root v. Sherwood*, 6 Johns. 68; *Blackley v. Sheldon*, 7 Johns. 32; *Reiten v. Ludwick*, 31 Penn. 131; *McKean v. Paschal*, 15 Tex. 37; *Martin v. Morelock*, 32 Ill. 485; see *Pierce v. Hasbrouck*, 49 Ill. 23; *Powell v. Feeley*, 49 Ill. 143; *Paige v. O'Neal*, 12

Cal. 483; 3 Bla. Com. 377; *Ashton v. Touhey*, 131 Mass. 26.

³ *Parrott v. Thacher*, 7 Pick. 426; *State v. Austin*, 6 Wis. 205; *R. R. Co. v. Faitz*, 19 Bradw. 85.

⁴ *Apthorp v. Backus*, 1 Kirb. 416; *Howe's Pr.* 258; *Suver v. O'Riley*, 80 Ill. 104.

⁵ *Bridge v. Eggleston*, 14 Mass. 245; *Nelson v. Bowen*, 15 Bradw. 477.

⁶ *Martin v. Ehrenfels*, 24 Ill. 187; *Allison v. People*, 45 Ill. 37; *Boetge v. Landa*, 22 Tex. 105; *R. R. v. Dana*, 1 Gray 83; *U. S. v. Reid*, 12 How. (U. S.) 361; *Reins v. People*, 30 Ill. 256; *Roy v. Goings*, 112 Ill. 656.

Verdicts.—Verdicts are of two kinds: *general* and *special*. The former are where the jury finds that the defendant is “guilty,” or “not guilty;” “did promise,” or “did not promise,” etc. The latter are where special facts are found, and the questions of law thereupon referred to the court. These, in Illinois, have heretofore seldom occurred.

General verdicts.—General verdicts ought to be framed in the words of the issue tendered;¹ but if they are informal the court will put them in form according to the justice of the case, before they are affirmed, if the point in issue can be collected from the finding;² or the court may send the jury back to put the verdict in proper form.³

A verdict should find the whole issue tried,⁴ and nothing more. If the jury should find facts not submitted to them, besides finding the issue, such improper finding will be rejected as surplusage;⁵ as if they should undertake to find costs for either party, with which subject they have nothing to do.⁶

The party in whose favor the verdict is rendered should see that it is in regular form; and this is usually done at the bar, before the verdict is affirmed.

The statute of Illinois provides that “whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict.”⁷

¹ *Gerrish v. Train*, 3 Pick. 124; *Harding v. Brooks*, 5 Pick. 244; see *Alwood v. Mansfield*, 33 Ill. 452; *Brown v. Keller*, 38 Ill. 63; *Parker v. Fisher*, 39 Ill. 164; *Harding v. Strong*, 42 Ill. 148; *Jarrard v. Harper*, 42 Ill. 457; *Bates v. Williams*, 43 Ill. 494; *Barker v. Young*, 44 Ill. 42; *James v. Morey*, 44 Ill. 352; *Underwood v. White*, 45 Ill. 437.

² *Osgood v. McConnell*, 32 Ill. 75; *Porter v. Rummery*, 10 Mass. 64; *Chittenden v. Evans*, 48 Ill. 52; *O'Brien v. Palmer*, 49 Ill. 72; *Ins. Co. v. Vanduzor*, 49 Ill. 489; *Boynton v. Phelps*, 52 Ill. 210; *Faulk v. Kellums*, 54 Ill.

189; *Pekin v. Winkcl*, 77 Ill. 56; *Clapp v. Martin*, 33 Ill. App. 438.

³ *Reed v. Thayer*, 9 Ind. 157; *Smith v. Williams*, 22 Ill. 357; *Martin v. Morelock*, 32 Ill. 485.

⁴ *Salk*, 472; *Clark v. Lamb*, 6 Pick. 512.

⁵ *Osgood v. McConnell*, 32 Ill. 75; *O'Brien v. Palmer*, 49 Ill. 72.

⁶ *Lincoln v. Hapgood*, 11 Mass. 358.

⁷ Rev. Stat. (1893) 1078; Rev. Stat. (1895) 1161; 2 Starr & Curtis 1822; *Bond v. Dustin*, 112 U. S. 604; *Santa v. Frank*, 113 U. S. 339; *Ins. Co. v. Whitehill*, 25 Ill. 466; *Barry v. Mackey*, 66 Ill. 104.

Where two suits between the same parties are consolidated, but one verdict is necessary.¹

Where the verdict of a jury is not in form, mere irregularity in the proceedings of the court in having the same put in form, as in oral remarks and instructions, which could not have affected the finding of the jury except as to the mere form of the verdict, will not be sufficient error to reverse.²

A verdict may be received on Sunday.³

Special verdict—Special findings.—The act of 1887⁴ provides,

1. That in all trials by jury in civil proceedings in this state, in courts of record, the jury may render, in their discretion, either a general or a special verdict; and in any case in which they render a general verdict they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury.

2. Submitting or refusing to submit a question of fact to the jury when requested by a party as provided by the first section hereof, may be excepted to and be reviewed on appeal or writ of error as a ruling on a question of law.

3. When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly.

Prior to 1872 the statute of Illinois did not provide for special verdicts. By an amendment to the Practice Act enacted in 1872 it was provided that a trial court might in its discretion require the jury, on request of either party, to render a special verdict, and the decision of the court in ordering or refusing to order a special verdict was held to be not reviewable in a court of appeal.⁵

¹ *Miller v. McManis*, 57 Ill. 126.

² *Brown v. Rounsavel*, 78 Ill. 589;
Poppers v. Bank, 10 Bradw. 531.

³ *R. R. Co. v. Horan*, 23 Ill. App.
259.

⁴ 3 Starr & Curtis 996; Rev. Stat.
(1895) 1162; Rev. Stat. (1893) 1078.

⁵ *Kane v. Footh*, 70 Ill. 587; *Barnes*
v. Hamon, 71 Ill. 609; *R. R. Co. v.*
Maxfield, 72 Ill. 95.

This provision remained in force until repealed in 1874.

The present statute differs from the former chiefly in that it makes it mandatory upon the court to require and upon the jury to make a special finding upon any material question submitted upon the request of any party to the action.

The question of fact upon which special findings are asked must, under the statute, be submitted to the adverse party before the commencement of the argument to the jury, and if not submitted until after that time the interrogatories will be rejected.¹

The special findings called for should be reasonable in number,² and must be based upon the grounds upon which a recovery is asked.³

A question submitted to a jury for a special finding should be single, direct, plain, and material to the case, and such as calls for a direct answer. Such questions can not seek the jury's conclusion upon a specified, partial view of the facts.⁴

The only questions material under the statute are such as, if answered as the party offering them desires, will make a verdict for the other party inconsistent.⁵

The general verdict controls under the statute, where the special finding can upon any hypothesis be reconciled with it;⁶ but where the general verdict is inconsistent and irreconcilable with the facts specially found, the special finding controls, and the general verdict will be set aside.⁷ The inconsistency must be an irreconcilable inconsistency, incapable of removal by any evidence admissible under the issue,⁸ and in determining whether there is such an inconsistency all reasonable presumptions are to be indulged in favor of the verdict

¹ *McMahon v. Sankey*, 133 Ill. 636; *R. R. Co. v. Ellis*, 58 Ill. App. 110.

² *R. R. Co. v. Bouck*, 33 Ill. App. 123; *R. R. Co. v. Kid*, 29 Ill. App. 353; *Ry. Co. v. Southworth*, 32 Ill. App. 307.

³ *Coal Co. v. Machl*, 130 Ill. 551.

⁴ *Manf. Co. v. Wilson*, 152 Ill. 10.

⁵ *Fortune v. Jones*, 30 Ill. App. 116; *Ry. Co. v. Dunleavy*, 129 Ill. 132; *Ry. Co. v. Bouck*, 33 Ill. App.

123; *Ebsery v. Ry. Co.*, 61 Ill. App. 265.

⁶ *Pahlman v. Taylor*, 75 Ill. 629; *Smith v. McCarthy*, 33 Ill. App. 176; *R. R. Co. v. Speer*, 156 Ill. 244; *Ry. Co. v. Bacon*, 104 Ind. 88; *Starrett v. Gault*, 62 Ill. App. 209.

⁷ *Ry. Co. v. Britz*, 72 Ill. 256; *Ry. Co. v. Dunleavy*, 129 Ill. 132.

⁸ *Ry. Co. v. Dunleavy*, 129 Ill. 132; *R. R. Co. v. Speer*, 156 Ill. 244.

and nothing is to be presumed in favor of the special findings.¹

The various pleadings are to be construed, where it reasonably can be done, to support the general verdict.² A special finding under the statute is not a special verdict; a special verdict can not be found where there is a general verdict, while a special finding can be required only where such a verdict is rendered.³ To have any effect upon a general verdict the answer to a special question must relate not to evidentiary facts, but to those ultimate facts upon which the rights of the parties directly depend.⁴

Where a party asks for a special finding of fact by the jury and they return an answer to the question, if he thinks such finding is not supported by the evidence he should ask for a new trial, assigning such finding as a reason.⁵

The mere failure of the jury to answer a question submitted to them, or the return by them of an irresponsive or unintelligible answer, will not entitle the party at whose instance the question was submitted, to have judgment in his favor. That is required by the statute only when the special finding is inconsistent with the general verdict.⁶

The failure of the jury to answer, or their returning an insufficient answer, ordinarily, at least, will not entitle the party asking the same, to a new trial. He should object before the jury is discharged, so that, if the objection be well taken, the court may send them back to perfect their verdict.⁷

Trial by court—Propositions of law.—Section 41 of the Practice Act provides that "in all cases in any court of record of this state, if both parties shall agree, both matters of law and fact may be tried by the court; and upon such trial either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'refused,'

¹*Ry. Co. v. Dunleavy*, 129 Ill. 132;
R. R. Co. v. Spear, 156 Ill. 244;
Starrett v. Gault, 62 Ill. App. 209.

²*R. R. Co. v. Goyette*, 32 Ill. App. 574.

³*Ry. Co. v. Dunleavy*, 129 Ill. 132.

⁴*Society v. Kalhoun*, 61 Ill. App. 266.

⁵*Avery v. Moore*, 133 Ill. 74.

⁶*R. R. Co. v. Goyette*, 133 Ill. 21.

⁷*Ibid.*; *Ins. Co. v. Chetlain*, 61 Ill. App. 450.

or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except, as to other opinions of the court."¹

Where a party wishes to preserve the ruling of the court on the law of the case, he should request the court to pass upon an appropriate proposition for that purpose.² It has been held that in cases of trials before the court without a jury, where no questions arise on the admission or exclusion of evidence, and no written propositions of law are presented or passed upon by the trial court *before or at the time of rendering judgment*, as provided by the foregoing section, no question of law is presented by the record for the determination of the court of appeal.³

The written propositions must be submitted *upon the trial* so that they may be considered by the court in the decision of the case.⁴

The provision of the statute that they may be submitted "within such time as the court may require" does not authorize an order of the court giving leave to submit them after the court has rendered a final decision, and erroneous rulings upon them made after final judgment has been entered will not reverse the judgment.⁵

Propositions of law presented to the court should state the law applicable to the case made by the pleadings and proof, with reasonable accuracy, and should be based upon the evidence;⁶ but a proposition of law, unlike an instruction to the jury, may be expressed in general or abstract terms.⁷

When there is nothing in the case calling for the application of the proposition it may be refused.⁸

Where the court is asked to hold a proposition of law based on a hypothetical case, it should be correctly and completely stated. Where the proposition is correct in principle upon

¹ 2 Starr & Curtis 1808; Rev. Stat. (1893) 1076; Rev. Stat. (1895) 1160.

² *Hobbs v. Ferguson*, 100 Ill. 232; *Farwell v. Shove*, 105 Ill. 61; *Ass'n v. Hall*, 118 Ill. 169; *Bank v. Haskell*, 124 Ill. 587.

³ *Allman v. Lumsden*, 159 Ill. 219; *Davies v. Phillips*, 27 Ill. App. 387.

⁴ *Allman v. Lumsden*, 159 Ill. 219; *Power Co. v. Carlyle*, 31 Ill. App. 325.

⁵ *Ibid.*

⁶ *Wadhams v. Swan*, 109 Ill. 46; *O'Bannon v. Vigus*, 32 Ill. App. 473.

⁷ *Vigus v. O'Bannon*, 118 Ill. 334.

⁸ *O'Bannon v. Vigus*, 32 Ill. App. 473.

the defendant's hypothesis and based on evidence, it should not be refused merely because the plaintiff has evidence tending to avoid and destroy its application.¹

Where there is evidence on the part of the plaintiff he should ask a declaration of the law on his theory as a separate proposition or as a proposition to accompany that of the defendant.²

The court may properly refuse to hold a proposition embraced in substance in a proposition already held.³ The court is not bound to hold every proposition of law asked; it is enough that those held state every essential principle of law.⁴

In a suit where the evidence is conflicting, a proposition that the plaintiff is not entitled to recover is a proposition of fact, and not of law, and will therefore properly be refused.⁵

No. 393. Form of submission of proposition of law.

In the ——— court.

———— Term, 18—.

A. B. }
v. } *Assumpsit.*

C. D. } And now comes the ——— by ——— his attorney, and submits the following propositions, and asks that the same may be held as law in the decision of the above entitled cause.

1. That, etc.

A. B., Attorney for ———.

¹ *Cothran v. Ellis*, 107 Ill. 413.

⁴ *Ins. Co. v. Hick*, 125 Ill. 361.

² *Ib.*

⁵ *Knowles v. Knowles*, 128 Ill. 110;

³ *Knowles v. Knowles*, 128 Ill. 110;

R. R. Co. v. Reich, 101 Ill. 157.

O'Bannon v. Vigus, 32 Ill. App. 473.

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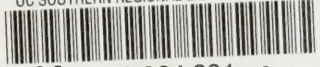
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